Land Trust Alliance

Conservation Leadership for America's Future

Standards and Practices Curriculum

Avoiding Conflicts of Interest and Running an Ethical Land Trust

Konrad Liegel, Esq.

Executive Editor · Sylvia Bates

Peer Reviewers · Jean Hocker and Jim Lentowski

The evolution of a land ethic is an intellectual as well as emotional process. Conservation is paved with good intentions which prove to be futile, or even dangerous, because they are devoid of critical understanding either of the land, or of economic land-use. I think it is a truism that as the ethical frontier advances from the individual to the community, its intellectual content increases.

Aldo Leopold

Avoiding Conflicts of Interest and Running an Ethical Land Trust

Practice 1D: Ethics

Practice 4A: Dealing with Conflicts of Interest

Practice 4C: Transactions with Insiders

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Land Trust Alliance

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With a Foreword by Rand Wentworth

The Land Trust Alliance

The Land Trust Alliance promotes voluntary land conservation and strengthens the land trust movement by providing the leadership, information, skills and resources land trusts need to conserve land for the benefit of communities and natural systems.

LTA course materials are furnished as to tools to help land trusts implement Land Trust Standards and Practices. They are provided with the understanding that the Land Trust Alliance is not engages in rendering legal, accounting or other professional counsel. If legal advice or other expert assistance is required, the services of competent professional should be sought. The Land Trust alliance makes no assurances that land trusts attending or completing these courses will be granted accredited status by the Land Trust Accreditation Commission.

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Foreword

Rand Wentworth

Following the highest ethical principles is critical to the success of the land trust movement, because each of our actions affects the entire land trust community. Our personal morality is learned at the knees of our parents, but acting in an ethical manner is a skill that can be developed from studying past mistakes and by creating sound, forward-looking policies to guide organizations through the potential ethical minefields that inevitably arise. The land trust movement is filled with good people and well-respected organizations. However, public confidence in the integrity and conservation purpose of land trusts can be shaken by the actions of good land trusts operating with the best of intentions, as well as by those who abuse the tax code for private gain. To help guide land trusts make ethical choices, I am happy to introduce "Avoiding Conflicts of Interest and Running an Ethical Land Trust" as the first course in the Land Trust Alliance's Standards and Practices Curriculum.

Given the complexity of many real-estate deals, most of us will occasionally find ourselves in an ethical gray area. For example, conservation buyer deals or conservation subdivisions may be effective tools to protect land, but these tools require keen judgment to prevent their abuse. How many of us have been tempted to sign a Form 8283 that exaggerates the true value of the property? What do you do if a major donor or a board member requests an amendment to a conservation easement? Does your land trust have policies in place so that when these difficult situations arise you have clear guidance on what steps to take to avoid personalizing the situation? How your land trust answers these questions may mean the difference between a sterling reputation and a scathing investigative report in the local paper. This course is designed to help you navigate through the sometimes complex ethical demands of our work.

The Land Trust Alliance is committed to helping land trusts preserve and protect their reputation. In this course you will find the information and tools you need to avoid ethical pitfalls and to manage

potential conflicts of interest. Furthermore, you will obtain strategies for putting this training to use in use in your land trust. We have provided a template that you can use to craft a conflict of interest policy that meets your unique needs. Our goal is to help you protect your reputation for integrity and excellence so that you are free to concentrate on the work you love — saving land.

The Land Trust Alliance will publish 14 more courses designed to help land trusts implement *Land Trust Standards and Practices*. They will cover subjects in governance, organizational management, stewardship, acquiring land and conservation easements and fundraising. You will be able to take these courses in a variety of formats — through self-study with books, through our new online learning center, and through in-person trainings at conferences sponsored by us and our many partners. If you want to sponsor your own training, we can provide the course materials, instuctor manual and slides. Simply find someone knowledgeable to present the course and contact the Land Trust Alliance. Then hold your training at a time and location convenient for you.

In creating the Standards and Practices Curriculum, we want to make the best practices in land conservation available to all land trust professionals and volunteers. LTA is dedicated to providing information and tools to make you successful in our common goal: to save more land. Your comments on the curriculum are welcome. Please let us know what you think by e-mailing us at learn@lta.org.

Summary

The most important asset of your land trust is public trust. It is not the land saved or the money your land trust has in the bank. Without public trust, your donors and the public will lose confidence in your mission and will stop supporting your programs. Instead of saving land for present and future generations, you may struggle to clear your name or even be forced to close your doors.

Land Trust Alliance president Rand Wentworth spoke to the importance of land trust ethics in his inaugural column in the Fall 2003 issue of *Exchange*:

> Landowners and donors now have a strong confidence in the integrity and conservation purpose of land trusts. But bad news travels quickly, and that confidence could be shaken by the unethical actions of one group. To protect the reputations of legitimate land trusts, we need to find ways to isolate the bad apples and recognize the good.

Wentworth went on in his column to recognize that the real-estate activities of land trusts are often complicated enough that land trusts need good guidance and keen judgment to prevent abuses that otherwise could result from their urgency to save land. This good guidance is particularly needed in the areas of conservation-oriented developments, appraisals, conservation easement amendments, enforcement actions, and any transaction involving a board member, staff member, volunteer or other insider.

This course is intended to provide "good guidance" in the areas of ethics and conflicts of interest. You will become acquainted with the available ethical and technical guidelines for the responsible operation of land trusts, including *Land Trust Standards and Practices*. In addition, you will gain the tools to develop, adopt and implement a conflict of interest policy tailored to the needs of your land trust.

Introduction

This course is designed to be taught in a 4.5-hour classroom training. Self-learning, either on-line or off-line, can usually be completed in slightly less time.

This course is part of a Land Trust Alliance response to an identified need and to land trust requests for a coordinated training series to help all trusts implement *Land Trust Standards and Practices*. Participation in the training curriculum, and the adoption of appropriate policies and practices, will help land trusts ensure the long-term protection of land in the public interest.

Why is implementing recommended ethical practices and conflict of interest policies critical to land protection?

In order to conserve land successfully, a land trust must earn and sustain public trust and credibility. Its community must believe that the land trust will treat people fairly, act in the best interests of the broader community and carry out its conservation responsibilities over time. A land trust guided by clearly articulated ethical principles and practices, which include adoption of and compliance with a conflict of interest policy, will be in the best position to win public understanding and support; avoid time-consuming, agonizing and destructive internal conflicts; stay out of legal trouble; and focus on its land-saving mission with confidence and clarity.

Who should take this training?

This course on ethics and conflicts of interest is designed for land trust board members, staff and volunteers — those land trust individuals whose actions reflect on how the land trust is perceived by the public.

Are there any prerequisites to the training?

No. The course materials are designed for a wide range of learners, including those new to the subject and those seeking a refresher on important topics.

How can I use this student guide?

Use the student guide for the following learning situations: instructor-led training, self-study, review and reference. It can be used at home, in the office or in class.

For those who prefer classroom training, this course will be delivered on a regular basis by qualified trainers at conferences and during training sessions sponsored by the Land Trust Alliance, land trust service providers and coalitions, and others.

You are encouraged to share this student guide with board members, staff and volunteers so that together you can implement the best practices described here. Those "Putting It into Practice" exercises that lend themselves especially well to in-house training and discussion have been identified.

How is the course organized and what will I learn?

This course is organized into three chapters, which cover three practices from *Land Trust Standards and Practices*:

1. Ethics (Practice 1D)
2. Dealing with Conflicts of Interest (Practice 4A)
3. Transactions with Insiders (Practice 4C)

Each successive chapter builds upon the previous chapter.

Specific learning objectives are provided at the beginning of each chapter. The goal of chapter 1, *Ethics*, is for you to achieve a greater appreciation of why implementing recommended ethical practices are critical to your land trust's future land protection activities and the credibility of the nation's land trust community. The goal of chapter 2, *Dealing with Conflicts of Interest*, is for you to attain a greater ability to manage actual and perceived conflicts of interest through the proper application of a well-developed conflict of interest policy. The goal of chapter 3, *Transactions with Insiders*, is for you to develop the skills necessary to manage conflict of interest issues successfully, specifically those dealing with insider transactions. Through the proper application of a well-developed conflict of interest policy, you will gain greater confidence in managing potentially risky insider transactions.

What resources will be available to me in taking this training?

This course includes the following resources:

- Sample land trust documents;
- A template to guide land trusts in writing their own conflict of interest policy;
- Case studies to demonstrate how land trusts have implemented the practice;
- Lists of additional resources for further study;
- A glossary of key terms; and
- An index for easy reference

Also remember that as Land Trust Alliance members, you have free access to LTA's online learning center, which has links to more than one thousand articles, reports, conference summaries and sample documents.

The course includes "Putting It into Practice" exercises that you may take back to your land trust for training and discussion among your land trust board, staff and volunteers. Tips for successfully implementing best practices have been pulled out of the text into the margins of the book.

How can I get the most out of this student guide, especially in self-study situations where an expert will not be on hand to help me?

The student guide is designed to be useful in both instructor-led and self-study situations. You can get the most out of this student guide by reading the chapters, working through the self-assessment and "Putting It into Practice" exercises and taking advantage of the additional resources for further study identified in each chapter. Specific guidance for the self-study learner is provided at various points within the student guide to ensure that the self-study learner can get the most from the material (given the lack of instructor feedback and classroom discussion opportunities).

How can I use the information provided in this student guide to prepare and present a statement of values, a statement of ethics and a conflict of interest policy to the land trust board or other interested parties?

The information in this student guide is designed to walk you through the steps necessary to prepare a statement of values, a statement of ethics, and a conflict of interest policy. Sample documents are also included, and you may consult the additional resources identified in each chapter for further study. The background reading and sample discussion questions are designed to help you work with your board to approve and implement your statement of values, statement of ethics, and conflict of interest policy.

Tips and Tools

You will find various tools to help you learn and implement the information presented. Important words are defined in the margins and highlighted with grasshoppers. Tips on implementing the practice or critical information are noted with dragonflies. The glossary begins on page 172; the Action Plan on page 170 can help you implement the training at your land trust.

Important words are defined in the margins and highlighted with grasshoppers.

Tips on implementing the practice or critical information are noted with dragonflies.

Notes

Chapter One · Ethics

Practice 1D: Ethics
The land trust upholds high standards of ethics in implementing its mission and in its governance and operations.

A land trust's ethical obligations extend from the land conservation community to donors and taxpayers, landowners, the land and the community at large. A land trust should embrace the fundamental values of honesty, integrity, fairness, respect, trust, responsibility, inclusiveness and accountability in all of its operations. A board may consider adopting an ethics statement.
—From the *Background to the 2004 revisions of* Land Trust Standards and Practices

Learning Objectives

After studying this chapter you should:

- Understand the importance of ethics to your land trust and why it is important to discuss ethics on a periodic basis;
- Know the extent to which your land trust is currently adhering to recommended ethical and accountability practices in the nonprofit sector;
- Know how to advance a discussion of ethics in your land trust;
- Be able to explain your land trust's ethical obligations to the public, donors, landowners, taxpayers, the land and the land trust community;
- Be able to explain why it is important to act within the confines of the land trust's mission and provide a public benefit;
- Be familiar with *Land Trust Standards and Practices* as the code of ethics for the land conservation community;
- Be familiar with Independent Sector's *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*; and
- Be able to work with the leadership of your land trust to craft a values statement for the organization and develop strategies for working with this values statement on an on-going basis.

Summary

Rightly or wrongly, the nonprofit world, like its corporate counterpart, has been tarnished recently by a public perception of ethical abuses. Your land trust is not immune from public scrutiny. It depends on public trust for its success. Without public trust, donors and the public at large will lose confidence in its mission and will stop supporting its programs. You may become so consumed with repairing a tarnished image that you neglect your mission to save land for present and future generations. If land trust leaders do not ensure effective governance, federal and state governments may step forward and more closely regulate land trust activities.

A land trust maintains the public's trust by upholding high standards of ethics in implementing its mission and in its governance and operations. In this course, you will learn ethical standards and be able to decide if your land trust is currently adhering to them.

This chapter begins with a self-assessment of your organization's accountability practices. Completing this assessment will give you a clear picture of your land trust's ethical health and where it needs to improve in order to comply with *Land Trust Standards and Practices*.

This chapter then opens the floor to a general discussion of land trust ethics. To whom is the land trust's primary ethical responsibility? To the landowner? To the taxpayer? To the land? To the community at large? What are the ethical standards your land trust should follow? First and foremost, we remind you that land trusts are nonprofit organizations and should adhere to general nonprofit accountability practices in their governance and operations. Second and more particularly, we note that *Land Trust Standards and Practices* are the ethical and technical guidelines for the responsible operation of a land trust. They have been specifically drafted with your needs in mind and serve as a code of ethics for your land trust. Independent Sector, a widely recognized national umbrella organization for nonprofits, advises all nonprofit organizations adopt a code of ethics such as that presented in *Land Trust Standards and Practices.*

Finally, this chapter considers how you may develop, review and adopt a values and/or ethics statement for your land trust. A *values statement* is an expression of what your land trust believes; an *ethics statement* describes how you put those values into practice. In addition to adopting *Land Trust Standards and Practices*, an additional ethics statement and/or values statement that lays out how your land trust will specifically implement *Land Trust Standards and Practices* can be important for your land trust. Along with a strong mission statement and clearly defined goals, they serve as additional guideposts as your organization considers projects. For example, a land trust may develop a values statement that articulates its concern for the health of the entire community (land, animals and people). In its ethics statement, the land trust pledges to decline conservation easements or land in certain areas of the community designated for affordable housing. When land protection opportunities in those areas arise, the land trust can use its values and ethics statements to help guide how it will respond to those opportunities. The process of developing and adopting your values and ethics statements can be invaluable to building an understanding of and achieving consensus on how your land trust approaches its land-saving mission, and can be as useful as the product itself.

What is Your Land Trust's Accountability IQ?*

Self-Assessment Exercise

Independent Sector, founded in 1980, is a nonpartisan leadership forum for charities, foundations and corporate giving programs committed to advancing the common good in America and around the world by sponsoring ground-breaking research, fighting for public policies that support a dynamic, independent sector and creating resources so that staff, board and volunteers can improve their organizations and serve their communities. Independent Sector has created the "Checklist for Accountability" to help nonprofits identify actions they can take to increase transparency and accountability in their organizations.

Conduct a quick assessment of the current accountability practices of your land trust, giving your organization one point for every "yes" answer. Scores are shown at the end.

Does your organization:

1. Hold staff and board trainings on ethics or take other measures to foster a culture of accountability and transparency?
2. Have a code of ethics and statement of values and post it on its website?
3. Follow a conflict of interest policy and post it on its website?
4. Have board members with financial expertise?
5. Have its financial statements independently audited? Or, depending on the budget size of your organization, have an outside review or compilation of its financial records in lieu of an audit?
6. Have board members review financial statements, including the Form 990?
7. Have its CEO or CFO sign the Form 990?
8. File its Form 990 electronically?
9. Post its Form 990 on its website?
10. Post its policies, financial information and information on programs and results on its website?
11. Have a whistleblower policy?
12. Take steps to remain current with the law?

* Adapted from and reprinted with the special permission of Independent Sector, a nonprofit, nonpartisan coalition of charities, foundations and corporate philanthropy programs whose mission is to advance the common good by leading, strengthening and mobilizing the independent sector. www.independentsector.org

If your organization scores:

12: Great. Keep it up and pass along your success stories and model policies to the Land Trust Alliance for others to learn from.

9–11: Good, but there's room for improvement.

6–8: You've indicated a commitment to accountability but need to advance beyond the basics.

0–5: Time to get serious about accountability. Engage your board, staff and volunteers quickly to help make the needed changes.

This course will help you—and your land trust—get serious about nonprofit accountability by focusing on two accountability practices of key importance to land trusts: ethics and conflicts of interest (including transactions with land trust insiders).

Getting serious about transparency and accountability in your land trust begins by engaging your board, staff and volunteers in a broader discussion of land trust ethics.

Discussing Ethics in Your Land Trust

Getting serious about transparency and accountability in your land trust begins by engaging your board, staff and volunteers in a broader discussion of land trust ethics. Let us prompt that discussion by asking and exploring possible answers to a few basic questions about land trust ethics. Then let us continue the discussion through two "Putting It into Practice" exercises for board, staff and volunteers: (1) an outline for discussing ethics within your land trust; and (2) a training module on the ethical behavior of land trusts.

What Are the Ethics for Land Trusts?

Webster's dictionary defines *ethic* as "the principles of conduct governing an individual or a group." In his famous essay from *A Sand County Almanac,* "The Land Ethic," Aldo Leopold considered the relations of humans to the land and to the animals and plants that grow on it, and the need for a land ethic. He wrote:

> All ethics so far evolved rest upon a single premise that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in that community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for). . . .
>
> The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. . . .
>
> The "key-log" which must be moved to release the evolutionary

> process for an ethic is simply this: quit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise. . . .
>
> The evolution of a land ethic is an intellectual as well as emotional process. Conservation is paved with good intentions which prove to be futile, or even dangerous, because they are devoid of critical understanding either of the land, or of economic land-use. I think it is a truism that as the ethical frontier advances from the individual to the community, its intellectual content increases. . . .
>
> The mechanism of operation is the same for any ethic: social approbation for right actions: social disapproval for wrong actions. . . .
>
> By and large, our present problem is one of attitudes and implements. We are remodeling the Alhambra with a steam-shovel, and we are proud of our yardage. We shall hardly relinquish the shovel, which after all has many good points, but we are in need of gentler and more objective criteria for its successful use. . . .

Leopold's "Land Ethic" broadened the principles of conduct governing humankind to include the land as part of the community to whom one has ethical obligations. He also argues that we must consider the effect of human actions on the land in the calculus of how to proceed on a course of action. Land trusts have internalized Leopold's ethic by making their core mission the saving of land for current and future generations.

An ethical land trust, it must be emphasized, follows its mission as a land trust organization.

But how do land trusts and their members take the core ethical principles embodied in "The Land Ethic" and relate them to the nuts and bolts of running sound nonprofit organizations? Our answer, in part: by following *Land Trust Standards and Practices.*

Land Trust Standards and Practices are the ethical and technical guidelines for the responsible operation of a land trust. The land trust community developed *Land Trust Standards and Practices* in 1989, then revised it in 1993, 2001 and 2004, because it believes a strong land trust community depends on the credibility and effectiveness of all its members and that employing best practices is the surest way to secure lasting conservation. *Land Trust Standards and Practices* builds upon the foundation of general accountability standards and practices for nonprofits, and details the specific guidelines that all land trust organizations should follow in their governance and operations.

Why Are Land Trust Ethics Important? Public Trust!

In its 2002 document, *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community*, Independent Sector describes just how crucial public trust is to a nonprofit:

> Public trust is the most important asset of the nonprofit and philanthropic community. The rights and responsibilities that the independent sector enjoys are a result of the trust afforded to the organizations of this sector. Donors give to and volunteers get involved with charitable organizations because they trust them to carry out their missions, to be good stewards of their resources, and to act according to the highest ethical standards. Most fundamentally, voluntary and philanthropic organizations must abide by the highest ethical standards because it is the right thing to do. (page 6)

Public trust is the most important asset of the nonprofit and philanthropic community.

In a summer 2004 article in *Exchange*, Stefan Nagel (an attorney of counsel to the Law Office of Stephen J. Small Esq., P.C. in Boston, Massachusetts) and I explored the question of nonprofit accountability. Our conclusion was likewise simple: "Land trusts are dependent for their success on public confidence." We continue:

> Without confidence that we will expend the grant funds we receive as promised in our grant applications, governments and foundations will be reluctant to provide grant funds to support the conservation activities of land trusts. Without confidence that we will expend the vast majority of the donations we receive on conservation (and not on fundraising or administration), donors will be reluctant to donate funds to support the conservation activities of land trusts. Without confidence that we will minimize business relationships with the entities on whose land we hold easements, the public will be reluctant to trust that land trusts will in fact enforce the restrictions found in the conservation easements we hold. (page 5)

In summary, in order to conserve land successfully, a land trust must earn and sustain its credibility. It must be trusted to treat people fairly, to act in the best interests of the broader community and to carry out its conservation responsibilities over time. An ethical land trust, it must be emphasized, follows its mission as a land trust organization. It "walks the talk," practicing what we land trusts preach on land conservation. Implementing *Land Trust Standards and Practices* helps land trusts uphold the public trust and build strong and effective land conservation programs.

Discussing Ethics within Your Land Trust: An Outline for Discussing Land Trust Ethics with Land Trust Board, Staff and Volunteers

This exercise is designed for use in instructor-led training, self-study and in-house land trust training and discussion. If used for self-study, we recommend that you review the following article and consider the questions that follow. If used for in-house land trust training, we recommend that the participants review the article and then discuss the questions among themselves.

The Ethical Responsibilities of Land Trusts

Darby Bradley, President

Vermont Land Trust Newsletter · Winter 2004

In October, I had the opportunity to talk on the subject of "ethics" to the national Land Trust Alliance Rally in Sacramento. My ideas were not new: They were the product of 26 years in the land conservation field; numerous conversations with landowners and communities; collaborations with farmers, foresters, affordable housing advocates and other land trusts; VLT Board conversations about promoting a land ethic; Gil Livingston's work with the Black Family Land Trust; and more. The land trust movement has come a long way since the mid-1970s. This excerpt suggests where it needs to go.

Let me pose the following question: Looking at the big picture, to whom is the land trust's primary ethical responsibility? To the landowner? To the taxpayer? To the land?

Let me suggest that a land trust's primary responsibility is to the Community At Large, and that because of this, we are obligated to think about the needs of that community which go far beyond land conservation. I use the word "Community" as Aldo Leopold did. It encompasses not only the human community, but also all of the other fauna and flora that depend upon the Earth's ecological systems to sustain life. It includes land not as real estate but as Leopold wrote, "a fountain of energy flowing through a circuit of soils, plants, and animals." "Community" includes people of different social and economic classes, people of different ages, and people of different racial and ethnic backgrounds. It includes the unborn generations of the future.

It is no longer ethical, in my view, to say that the job of a land trust is to conserve land, and that meeting all the other needs of the community is somebody else's job. We must consider the bigger picture and the context within which we do our work. Back in

the early days of the Land Trust Alliance, we could get away with thinking just about conserving land. The subject was so new to everybody, and for the most part our early efforts were so feeble, that it didn't really matter much what the context was.

But we are no longer minor actors on the fringes of the land use stage. The land trust community has been incredibly successful, and with that success has come new responsibilities. In Vermont, the Vermont Land Trust, The Nature Conservancy, the Vermont Housing and Conservation Board, and other conservation organizations have protected 8 percent of the state's entire land base. In some farm communities, we have protected over 25 percent of the land base, and that could be 50 percent in ten years. We have an obligation to think about where housing should go, where economic development should occur, and what else communities need to remain healthy and diverse. We also have an obligation to involve the community in our decisions about what land to conserve and for what purpose. We need to figure out effective ways to involve the public in these decisions. This is not a matter that should be left just to the landowner and the land trust. We might think of conservation as one tool for fighting sprawl. However, if we conserve land in the places best suited for growth, we are promoting sprawl, not limiting it.

I also don't feel it is ethical to say that one type of use will always have a "higher" value over another type of use, that wilderness represents a higher conservation value than a working forest, or that agriculture has a higher value than housing. For me, it depends upon the context and the needs of the larger community, including the natural community. Clearly, we need all types of land, from urban areas to wilderness, and we need them in the right places. And we must see them as linked. It has been pointed out many times that we cannot save the wilderness unless we save the city. If our urban centers are attractive and economically vital, it will take some of the pressure off our rural areas.

As a society, we have an ethical obligation to reduce our consumption of the world's resources, and to try to meet a reasonable portion of our needs from our own resources. This is where land trusts come in. If the Vermont Land Trust tried to conserve all of Vermont's farms without considering how and where the state will meet its need for affordable housing and economic development, we are shirking our ethical responsibilities to the larger community. If we conserve all of our forestland as wilderness, we are shifting our demand for wood products to other parts of the world, which may be less well suited ecologically to meeting them. As Peter Forbes recently pointed out to me, referring to a Christian and Buddhist metaphor, it is sometimes easy to confuse the boat from the shore. The "boat" is the tool we use for land conservation (options, easements, creative financing, etc.). The "shore" is a more just and healthy community. "When we think that our tools are the end-game," Peter said, "we forget the shore and we forget the ethical and big-picture reasons for our existence."

In thinking about the shore, we must also find ways to ensure that our work benefits everybody in the community. I have been coming to Rally since 1985, but in that time the color of the faces here has changed very little. My ears are still ringing with the words of Charles Jordan spoken during his keynote address at the Portland Rally three years ago. "What people don't value, they won't preserve," Charles said. The face of America is changing. If we don't find ways to work with other ethnic and racial groups, if we don't reach out to assist people who are less advantaged economically, they won't value what we've accomplished, and what we've accomplished won't endure. Some organizations, like the Trust for Public Land, have been exemplary in this area. Others, like the Black Family Land Trust, are getting started with the help of the land trust community, but much more needs to be done.

I am not suggesting that land trusts must become affordable housing and economic development specialists. These fields require their own expertise and skills, which we may not possess. However, what we can do is look for opportunities to assist other organizations in accomplishing their goals, such as making land available for housing in a suitable area.

I admit that if we view our work within the context of the needs of the larger community — if we keep our focus on the "shore," as Peter Forbes would say — the questions we must ask ourselves become much more complex and the answers become much more difficult to reach. But, that is the consequence of our success. We must consider the full implications of our actions and keep the big picture always in mind, or we will be falling short of our ethical responsibilities to the community.

In the past 29 years the Vermont Land Trust has conserved more than 450,000 acres or about 8% of the private, undeveloped land in the state, including more than 500 working farms. VLT helps landowners and groups voluntarily limit development on productive farmland and forestland, and other meaningful natural and community places. This conservation work changes the lives of families, invigorates farms, launches new businesses, maintains the glorious views, encourages recreational opportunity, and fosters a renewed sense of community.

Discussion Questions

Please answer the following questions. For guidance on considering the questions please turn to page 35.

To whom or what does your land trust have ethical obligations?

What are your land trust's obligations to the public?

To prevent private benefit, in part by avoiding conflicts of interest (*see* chapters 2 and 3, which discuss Practices 4A and 4C)

- What if a board member wants to donate land to your land trust?
- What if a board member wants to buy land offered for sale by your land trust?
- What if your executive director wants to hire her attorney-husband to provide legal or other professional services to the land trust?
- What if a major donor wants you to rent office space from him?
- What if a major donor wants an amendment to his or her easement?
- Does it make a difference whether the conflict is real or perceived?

To ensure public benefit (*See* Practice 8D, Public Benefit of Transactions: The land trust evaluates and clearly documents the public benefit of every land and easement transaction and how the benefits are consistent with the mission of the organization. All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit.)

- What is "public benefit"?
- Does public benefit require consideration of community values, and how do we know what the values of a community are?
- Is a list of conservation values the same as public benefit?
- Is there public benefit from 200 acres of conserved land with 20 reserved 1-acre house lots? How would you know?
- Is there public benefit from a protected private golf course in a developed area?

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. The IRS prohibition on private benefit is absolute. Incidental benefits are considered to be those benefits that are insubstantial when measured in the context of the overall public benefit conferred by the activity. Incidental benefits occur as part of the nonprofit's public purpose and activity, which cannot be achieved without benefiting some private individuals. For example, the incidental benefits to an adjoining property owner that typically result from a conservation easement both fall within the land trust's mission and are insubstantial in the context of the overall benefit of protecting the property. Such incidental benefits to the adjoining property owner would not be considered a private benefit.

- Is there public benefit if the holder of the conservation easement over the land has no capacity or intention to enforce?
- How can a land trust document public benefit?
- Does your land trust have other obligations to the public?

What are your land trust's obligations to the landowner?

To ensure that its communications with the landowner are honest and forthright *(See* Practice 9J, Public Benefit of Transactions: The land trust evaluates and clearly documents the public benefit of every land and easement transaction and how the benefits are consistent with the mission of the organization. All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit. *Also see* Practice 11D, Public Benefit of Transactions: The land trust evaluates and clearly documents the public benefit of every land and easement transaction and how the benefits are consistent with the mission of the organization. All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit.)

- When purchasing land or a conservation easement, does your land trust disclose the appraised value? If not, how else can the land trust be sure it is honest and forthright?
- Does your land trust monitor ownership changes and communicate with new owners of easement land?

To work with the landowner to evaluate and select the best conservation tool (*See* Practice 8H, Evaluating the Best Conservation Tool: The land trust works with the landowner to evaluate and select the best conservation tool for the property and takes care that the chosen method can reasonably protect the property's important conservation values over time. This evaluation may include informing the landowner of appropriate conservation tools and partnership opportunities, even those that may not involve the land trust.)

- If a landowner comes to your land trust with an easement donation, and your land trust knows that public or private funding may be available, is your land trust obligated to disclose that to the landowner?

- If your land trust does not have the resources to deal with historic properties and is presented with a project on which there are historic structures, is your land trust obligated to seek a partner?
- How should your land trust manage its landowner obligations?
- Does your land trust have other obligations to the landowner?

What are your land trust's obligations to the taxpayers?

To inform donors of appraisal requirements, to request a copy of the appraisal, and to not knowingly participate in projects where there are significant concerns about the tax deduction (*See* Practice 10B, Appraisals: The land trust informs potential land or easement donors [preferably in writing] of the following: IRC appraisal requirements for a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than $5,000, including information on the timing of the appraisal; that the donor is responsible for any determination of the value of the donation; that the donor should use a qualified appraiser who follows Uniform Standards of Professional Appraisal Practices; that the land trust will request a copy of the completed appraisal; and that the land trust will not knowingly participate in projects where it has significant concerns about the tax deduction. *Also see* Practice 10D, Donee Responsibilities: IRS Forms 8283 and 8282. The land trust understands and complies with the responsibilities to sign the donor's Appraisal Summary Form 8283 and to file Form 8282 regarding resale of donated property when applicable. The land trust signs Form 8283 only if the information in Section B, Part 1, "Information on Donated Property," and Part 3, "Declaration of Appraiser," is complete. If the land trust believes no gift has been made or the property has not been accurately described, it refuses to sign the form. If the land trust has significant reservations about the value of the gift, particularly as it may impact the credibility of the land trust, it may seek additional substantiation of value or may disclose its reservations to the donor. [*See* Practice 5B for other gift substantiation requirements.])

- How can your land trust work with landowners to secure good appraisals?
- Why is having the appraisal helpful to the land trust?
- What should your land trust do with the appraisal?
- What if your land trust is presented with a Form 8283 in which the property is not accurately described?

Letter of Opinion: a written estimation of a property's value, most often prepared by a qualified appraiser. A letter of opinion may be used instead of a qualified independent appraisal when the economic value of the property is so low as to negate concerns about private inurement or private benefit or when a full appraisal is not feasible before a public auction. (A letter of opinion is not sufficient in the case of transactions with insiders.) An appraiser may call this document a Restricted Use Appraisal Report.

- What if your land trust thinks the project is a *quid pro quo* and the landowner is claiming a deduction?
- What if your land trust sees an appraisal or Form 8283 in which the stated value seems way out of line?
- What if the easement is already signed and recorded?
- How should your land trust manage its taxpayer obligations?

Does your land trust have any other obligations to the taxpayers?

What are your land trust's other ethical obligations?

To donors?

- Can you redirect funds from a donor to similar, but not identical, purposes?
- Can you use funds solicited for one piece of land to purchase another?
- How do you track any legal agreements that must be honored?
- How do you respect donor privacy?

To the land?

- Should a land trust allow commercial forest management on forest land that ecologically requires several hundred years to restore itself?
- Should a land trust allow unrestricted agriculture, even if there are sensitive wetlands on-site?

To the land trust community?

- Does each land trust stand alone, or does each land trust have an obligation to the larger land trust community?

What are your land trust's obligations to the community at large?

Who is included in the community at large?

- Is it simply the physical/natural community where we live?
- Is it the entire human community?
- Can we pick and choose community members (only farmers or only conservationists, for example, but not anti-conservationists in our human community)?
- Should a land trust consider conserving land in areas a town has zoned commercial or industrial?

Guidance

To whom or what does your land trust have ethical obligations?

- To the public
- To donors
- To the landowner
- To the taxpayers
- To the land
- To the land trust community
- To the community at large
- Other?

What are your land trust's obligations to the public?

To prevent private benefit, in part by avoiding conflicts of interest (*see* chapters 2 and 3, which discuss Practices 4A and 4C)

As you will learn in this course, the fallout from unadressed conflicts of interest — whether real or perceived — can be serious. Mishandled conflicts of interest may result in a violation of the law, loss of tax-exempt status or a successful lawsuit against the land trust. More likely, you may face financial losses, loss of credibility in the community, and a corrosive atmosphere of distrust and decaying morale among your board and staff.

As you will also learn in this course, transactions involving "insiders" (e.g., board members, staff and major donors) by their nature present issues of conflicts of interest. Avoiding and appropriately managing actual and perceived conflicts of interest need not be difficult for a land trust. First, however, you must know the law on conflicts and take steps for dealing with them appropriately. This course will provide the necessary background for you to manage conflicts successfully.

To ensure public benefit (*see* Practice 8D)

As a charitable organization, your land trust must provide a public benefit through its land protection activities. By considering community values, embodied in part by the requirements within federal, state and local laws, you can ensure that the actions of your land trust provide a public benefit. Public benefit can be measured in a number of different ways, but they extend beyond a list of conservation values. As natural, cultural, open-space, and historic resources are increasingly

threatened and diminished, the idea of public benefit has been considerably broadened from that of public access. The preservation and protection of the natural environment is generally recognized as a charitable purpose by the IRS. A wide range of federal, state and local conservation statutes and policies make it clear that public benefit may be broadly defined. Thus, whether or not there is public benefit from 200 acres of conserved land with 20 reserved 1-acre house lots depends upon an array of factors. Likely yes, if such a configuration preserves an endangered plant or animal species. Probably not, if the conservation plan simply sets aside open space that can only be visually or physically enjoyed by the residents of the house lots.

All conservation easements should document the public benefit of the transaction in the easement itself. In addition, the baseline documentation report should identify how the protection of the property meets the conservation purposes test of the Internal Revenue Code and any other requirements of state or local laws and regulations. For non–conservation easement projects, the project file should contain some documentation of the public benefit served by the transaction.

A mission statement that clearly identifies your land trust's public purpose is also an important guidepost in ethical and conflict of interest discussions. Keeping your organization's public purpose in the forefront can help your land trust make choices that further public rather than private interests.

What are your land trust's obligations to the landowner?

To ensure that its communications with the landowner are honest and forthright (*see* Practices 9J and 11D)

As noted earlier in this chapter, the public's trust in your organization is the most important asset of your land trust. Treat landowners and others with respect and honesty. Promptly communicating with new owners of easement land and disclosing the true value of land proposed to be acquired by your land trust (as appropriate to the transaction) are ways to engender and retain the public's trust.

To work with the landowner to evaluate and select the best conservation tool (*see* Practice 8H)

Again, treat landowners with respect and honesty. What will your land trust gain in the long-term if it undertakes a conservation project that it is not equipped to handle? Or if it secures a conservation

easement by donation only to lose the trust of the landowner when he or she learns that the easement could have been purchased instead? The truth has a way of coming out no matter how deeply buried, so it is in your land trust's best interest to be open and honest in all of its dealings.

What are your land trust's obligations to taxpayers?

The public subsidizes land conservation by giving preferential tax treatment to taxpayers who donate interests in land to qualified public charities such as land trusts. With the privilege of receiving these tax-deductible gifts comes responsibility. This responsibility includes refusing to be a party to a transaction in which there are significant questions about a property or easement donation's deductibility. Your land trust should inform the landowner and his or her advisors about the appraisal and substantiation requirements early on in the transaction discussions, including what your land trust will do if it believes that the valuation seems unreasonably high or other requirements are not being met. You should be clear about what you will do even if the interest in land has already been conveyed. To do less is to shun your responsibility to the taxpayer-donor and to all other taxpayers who help subsidize land conservation through preferential tax treatment programs.

What are your land trust's other ethical obligations?

To donors?

In answering these questions, consider again the importance of the public's trust. Your land trust will not engender and retain the trust of its donors and the public if it is dishonest or misleading with respect to the use of donated funds or is not careful in fulfilling its donors' wishes.

To the land?

Revisit your land trust's mission statement. A mission statement that clearly specifies the organization's public purpose is a valuable touchstone in evaluating the appropriate use of conserved land.

To the land trust community?

Clearly, no land trust stands alone. Its actions reflect not only on itself but on the land trust movement as a whole. If one land trust loses public trust, public trust is at risk for all land trusts.

What are your land trust's obligations to the community at large?

We end where we began — with a consideration of the community at large. As land trusts, we must view our work within the context of the community at large. As we undertake our work, we must find ways to ensure that our work benefits everybody in the community. By keeping the big picture in mind, we can fulfill our ethical responsibilities to all of our constituents. By keeping the big picture in mind, we are most likely to attract and retain the public trust we need to remain successful in saving land.

Notes

Discussing Ethics within Your Land Trust

This exercise has been adapted from the training module *Land Trust Board, Staff and Volunteers on the Ethical Behavior of Land Trusts* (prepared by, and reprinted with permission from, Hans Neuhauser, Executive Director, Georgia Land Trust Service Center)

This exercise is designed for use in instructor-led training, self-study and in-house land trust training and discussion. If used for self-study, we recommend that you read the text and answer the questions in the order they are presented. If used for in-house land trust training, we recommend that you identify a facilitator (such as a member of the board, the executive director or an outside consultant) to lead the exercise.

Guidance on considering the questions and scenarios presented begins on page 44.

Introduction

This exercise is based on the notion that the process of developing a code of ethical practice is almost as important as the practice itself. Simply checking a box indicating that your land trust adheres to ethical behavior may not be effective in getting each land trust board and staff member to behave ethically. The commitment to ethical behavior must come from inside each individual in order for the practice to become a reality for the land trust as a whole. In effect, an organization's board, staff and volunteers must cultivate an ethical outlook with respect to their entire lives — not just that part involved with the land trust.

Ethical Practice

The Land Trust Alliance has identified the ethical operation of land trusts as critical to land trusts' credibility and, therefore, has made verification of ethical operation a component of the land trust accreditation program. This indicator practice is stated as follows:

> Practice 1D. Ethics. The land trust upholds high standards of ethics in implementing its mission and in its governance and operations. (*Land Trust Standards and Practices*, revised 2004)

A Brainstorm Exercise

There are other reasons — beyond the Land Trust Alliance saying that it should — for a land trust to behave ethically. What are some of them? What are the most important reasons?

Now reconsider the materials presented earlier in this chapter, for example, in the discussion of why land trust ethics are important and in the "Putting It into Practice" exercise that followed (pages 28–38).

Ethical Situations

Now that you have determined that there are a number of important reasons why your land trust should behave ethically, let's explore some scenarios in which ethical behavior comes into play.

Finding something of value at the shopping center

Scenario One: You are walking down a store aisle and you see a dollar bill on the floor. There is no one nearby who may have dropped it. What do you do with the dollar? Do you put it in your pocket? Do you give it to the store clerk to put in the lost-and-found box? Do you put the dollar into one of those charitable solicitation jars at the checkout counter? Would you do something else with the money?

Scenario Two: Assume the same situation as in scenario one, but this time you find a loose diamond. What do you do with it? Is your answer the same as for scenario one or is it different? Why?

What can we learn from your response to these two scenarios?

Running a stop sign

Scenario One: You are beginning your commute to work, and you notice your neighbor runs the stop sign at the corner. Do you ignore it? Do you bring up the matter the next time you see your neighbor? Do you report your neighbor to the police?

Scenario Two: Assume the same situation as scenario one, but this time your neighbor runs the stop sign, hits a pet and drives on. What is your response?

What can we learn from your response to these two scenarios?

Now let's consider some scenarios that relate more to land trust operations.

Exaggerating a claim in a fundraising letter

Scenario: A staff member has drafted a fundraising letter in which a claim is made that the land trust saved X acres of land in the past year. As board chair and as the intended signer of the letter, you recognize that the acreage figure is grossly exaggerated. What do you do?

Potential conflicts with heirs

Scenario: An elderly lady comes into your office and tells you that she has become upset with her offspring — her likely heirs — and wants to give you her land in her will. She has not discussed the matter with her kin. Do you go along with her wishes? Do you advise her to seek reconciliation with her heirs?

Signing a Form 8283 with inflated values

Scenario: A donor regularly gives generously to the land trust. Now the donor has given you an important piece of property and asks you to sign IRS Form 8283 acknowledging the donation. While you are not an appraiser, you note that in the form the value of the donation appears to be grossly exaggerated. What do you do?

You have likely employed some type of ethical test in framing your responses to the questions. How would you describe the test? Did you employ the same test for each of the situations? Or did you employ one test for some and a different test for others?

Four Ethical Tests

Now consider the following ethical tests. If you employed these tests in considering each of the above scenarios, how would your answers to the questions change, if at all.

The Golden Rule

Do unto others as you would have them do unto you.

The Feel Test

Though it may be legal, does the situation feel funny or wrong? If so, do you still want to pursue it?

The Grandmother Test

Can you explain the situation, and what you propose to do about it, to your grandmother? And with a straight face? Will she understand your explanation and will she approve of your proposed action?

The 60 Minutes/Washington Post Test

Can you justify your actions to the media with explanations that are clear and concise enough — in other words, well thought out in advance — to appear on the evening news or the morning headlines?

Can you think of other ethical tests that your land trust should consider when deciding to undertake a project or pursue a course of action? If you employed other tests in considering the above scenarios, how did your repsonses to them differ?

Wrap-up

Now consider how you will ensure that your land trust acts ethically. Who in your land trust has this responsibility? What procedures do you have in place if a land trust associate has concerns about the ethical behavior of another land trust associate? Are there protections in place for whistleblowers (for example, for a staff member who has concerns about the ethical behavior of the executive director)?

Guidance

The guidance provided below is intended to make you think about the answers you provided to the questions posed by these ethical situations. In most cases there may not be a right or wrong answer. In other cases, however, the ethical course is less ambiguous.

Ethical Situations

Finding something of value at the shopping center

How you respond to this scenario will likely depend upon the value you attach to what you found and the value you believe the person who lost the item attached to it, your sense of the likelihood of finding the person who lost the item, and how you would like to be perceived by those around you. You are likely to act differently with the loose diamond than the dollar bill. You will probably look for the person who lost the diamond, given its greater value and the greater chance the person who lost it can be located. You are also more likely to be concerned that others will perceive you negatively if you keep the diamond, but not if you keep the dollar bill.

Running a stop sign

How you respond to this scenario will likely depend upon the value you generally attach to observing rules and regulations, your sense of how you would like to be treated if others saw you run a stop sign, and your sense of the harm that was or could be caused by the traffic violation. You are more likely to report the neighbor if you saw him or her hit a pet than if no harm was caused by the traffic violation.

Exaggerating a claim in a fundraising letter

How you respond to this scenario will likely depend upon the value you generally attach to accuracy, your desire to present your land trust in the best light possible, and your sense of how you will be perceived by those who know the figure to be grossly exaggerated. Given that you are signing the letter, you are probably going to be more concerned about its accuracy than if you were not. However, accurate representations are a basic rule of ethical fundraising. Practice 5C (Accurate Representations: All representations made in promotional, fundraising, and other public information materials are accurate and not misleading with respect to the organization's accomplishments, activities

and intended use of funds. All funds are spent for the purpose(s) identified in the solicitation or as directed in writing by the donor.) makes it clear that land trusts should not be misleading with respect to their accomplishments.

Potential conflicts with heirs

How you respond to this scenario will likely depend upon the conservation value you attach to the land, your sense of how you would like to be treated in a similar situation, and your sense of how your land trust will be perceived when the likely heirs learn what happened. Caution is recommended.

Signing a Form 8283 with inflated values

How you respond to this scenario will likely depend upon your understanding of the legal import of your signature, your sense of how your land trust will be perceived by your signing of the form, and your sense of how the donor will react if you do not sign the form. Practice 10D (Donee Responsibilities — IRS Forms 8282 and 8283: The land trust understands and complies with its responsibilities to sign the donor's Appraisal Summary Form 8283 and to file Form 8282 regarding resale of donated property when applicable. The land trust signs Form 8283 only if the information in Section B, Part 1, "Information on Donated Property," and Part 3, "Declaration of Appraiser," is complete. If the land trust believes no gift has been made or the property has not been accurately described, it refuses to the sign the form. If the land trust has significant reservations about the value of the gift, particularly as it may impact the credibility of the land trust, it may seek additional substantiation of value or may disclose its reservations to the donor. [See 5B for other gift substantiation requirements.]) provides further guidance and recommends that if a land trust has reservations about the value of the deduction being claimed, it should consider seeking additional substantiation of value and/or sharing its reservations with the landowner in advance of signing the Form 8283.

Addition Ethical Tests

There are at least three other ethical tests that are worthy of your land trust's consideration:

The Coffee Shop Test

Could you defend the actions of your land trust over coffee with folks at the local coffee shop?

The Call Your Lawyer Test

Should you undertake the action if you feel you need to check with your lawyer first to see if the action is legal?

The Mission Test

Is going forward with the action really in the best long-term interests of your land trust and of land conservation in general?

Wrap-Up

One way to ensure that your land trust acts ethically is to have your land trust adopt *Land Trust Standards and Practices* as its code of ethics. This code of ethics can be supplemented, and its implementation facilitated, by a values statement or ethics statement specific to your land trust. The take-home "Putting It into Practice" exercise 3 (see page 52) suggests a step-by-step process you can use in developing this statement of values and/or ethics for you land trust.

Notes

Developing a Statement of Values and/or Ethics

In the introduction to its *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*, Independent Sector advises all organizations to adopt a code of ethics. There is no need for an individual land trust to prepare its own code of ethics because *Land Trust Standards and Practices* has been specifically developed as a code of ethics for land trusts.

However, now that you and your land trust have thought about why ethics are vital to your success and you have learned how to think about ethical questions, your land trust should consider adopting a more formal statement of values and/or ethics that will allow you to apply the broad ethical principles of *Land Trust Standards and Practices* to your land trust's unique mission and community. The process of doing so can be invaluable for building an understanding of and achieving consensus on how your land trust approaches its land-saving mission. Note that an additional values or ethics statement is not explicitly part of *Land Trust Standards and Practices*. However, developing and adopting such statements is worthy of consideration and can strengthen your organization.

A statement of values is an expression of what your land trust believes in on a broad level (for example, a commitment to the public good and to public accountability). These values inform and guide the actions that organizations should take in developing their policies and practices. An ethics statement describes how you put those values into practice in your day-to-day activities. The resulting document is a set of broad principles, not a detailed set of operational practices, which can be posted on the land trust's website.

Land Trust Standards and Practices calls for land trusts to uphold high standards of ethics in implementing their mission, governance and operations. Because this statement is so general, a land trust may choose to define what it considers high ethical standards. Its values statement may, for example, articulate the land trust's belief that land use should be fair and equitable for all members of the community. Its ethics statement may include the land trust's preference to consult with community groups before accepting easements in areas designated for affordable housing.

The land trust board and staff should be involved in developing, drafting, adopting and implementing the statement of values and/or ethics. Other important stakeholders, such as major donors, volunteers and program beneficiaries, each of whom will bring different and valuable perspectives, should also be invited to participate.

Independent Sector advises, and the Land Trust Alliance concurs, that every board should engage in a discussion of its ethics and values every year or two.

The following case study shows how a group of land trusts within a specific region articulates their values or principles, and the subsequent "Putting It into Practice" exercise suggests a step-by-step process you can use to develop a statement of values and/or ethics for your land trust.

Case Study: Gathering Waters Conservancy — Wisconsin Land Trust Statement of Principles

Gathering Waters Conservancy is a land conservation organization formed in 1994 to assist land trusts, landowners and communities in their efforts to protect Wisconsin's land and water resources. Established by a coalition of land trusts, Gathering Waters Conservancy serves as an education and technical assistance center for land trusts and landowners alike. As part of its programs, Gathering Waters Conservancy offers organizational assessments that evaluate how well a land trust has integrated *Land Trust Standards and Practices* into its operational and conservation functions.

To help show commitment to the principled development of land trusts in Wisconsin, Gathering Waters developed the Wisconsin Land Trust Statement of Principles Resolution, a document that holds Wisconsin land trusts "to dedicate ourselves to the protection of local, regional and statewide natural resources which contribute to the ecological, social and economic well being of our communities." To date, 22 Wisconsin land trusts have signed on to the Statement of Principles.

The following ethics statement is adapted from the Wisconsin Land Trust Statement of Principles Resolution.

> I, as a [board or staff] member of the [specify organization], dedicate myself to the protection of land that furthers the mission of [organization]. As a representative of [organization], I have an obligation to help maintain the credibility of the land conservation community by ensuring that my actions will enhance the reputation of land conservation. I acknowledge the trust placed in [organization] by our donors, landowners, partners, and the public, and my actions will always uphold that trust.
>
> I pledge to conduct organizational and land protection activities under the highest professional standards and in accordance with *Land Trust Standards and Practices*. Furthermore, I pledge to be

especially diligent in ensuring that my actions serve the public interest, respect all laws, demonstrate integrity, and consider the long-term responsibility to the lands we protect.

Questions

- This statement of principles is a public expression of a land trust member's awareness of its ethical obligations and its commitment to ethical standards. What do you see as the benefit of such a statement to the land trust participants who sign it? To the public at large?
- Does your land trust have a similar ethical statement? If so, do your board members or staff members sign the statement? Is the statement posted on your land trust's website?
- Does your land trust have a different statement of values and/or ethics that works better? If you do not have such a statement, why not?

Notes

Developing, Adopting and Implementing a Statement of Values and/or Ethics

This exercise has been adapted from and reprinted with the special permission of Independent Sector, a nonprofit, nonpartisan coalition of charities, foundations and corporate philanthropy programs whose mission is to advance the common good by leading, strengthening and mobilizing the independent sector (www.independentsector.org).

This exercise is designed for in-house land trust use.

First review Independent Sector's *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community* and *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*, and *Land Trust Standards and Practices.*

Developing a Statement of Values (Phase One)

Convene a group of stakeholders to develop a list of values that might be included in your organization's statement. Important stakeholders may include major donors, volunteers and program beneficiaries, each of whom will bring different and valuable perspectives.

Have the group brainstorm by answering these questions:

- What values are unique to our organization's mission?
- What values should every nonprofit organization and society in general uphold?
- What values should guide the operations of the organization?
- What values should guide the personal conduct of staff, board and volunteers?
- Draw from examples of values statements from other organizations as models. (See pages 57–63 in "Additional Resources" for samples of several values statements and codes of ethics developed by land trust organizations. In addition to its model *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*, Independent Sector has a compendium of standards, codes and principles of nonprofit and philanthropic organizations at its website, where more than 100

statements are compiled. *Land Trust Standards and Practices* is one of the statements profiled. www.independentsector.org).

- Develop consensus around the values that stakeholders believe are the most important for your organization. Narrow these to the essential core values of the organization.
- Organize a small drafting committee to put the ideas into words.
- Reconvene key stakeholders and revise the statement as needed.
- Secure approval from the board of directors.

Developing a Statement of Ethics (Phase Two)

Using the organization's statement of values as a foundation, turn your attention to developing an additional ethics statement describing how those values will be put into practice. If your organization has adopted *Land Trust Standards and Practices*, you can develop a brief additional ethics statement similar to the one adopted by Gathering Waters Conservancy, using the standards and practices as your guide.

- Have the group of stakeholders that completed the values statement review *Land Trust Standards and Practices.*
- Consult the completed values statement, noting where your organization would want to add additional ethical statements to *Land Trust Standards and Practices.*
- Formalize a statement of your commitment to *Land Trust Standards and Practices* (such as the sample adoption resolution provided by the Land Trust Alliance, provided below) and add any additional ethical principles that should guide your land trust. These may cover issues such as:
  - Personal and professional integrity;
  - Openness and disclosure;
  - Inclusiveness and diversity;
  - Any other areas the stakeholders deem important.
- Secure approval of the adoption resolution and any additional ethics statement by your board of directors.
- Forward a copy of your statement to the Land Trust Alliance so

that it can have the best information when considering future revisions to *Land Trust Standards and Practices*.

- Design a system (such as a standing board committee) to ensure regular review of adherence to the values statement, to *Land Trust Standards and Practices* and to any additional statement of ethics.
- Have each board and staff member sign the statement of ethics each year.

Sample Board Adoption Resolution for Land Trust Standards and Practices

WHEREAS, the [organization] has reviewed *Land Trust Standards and Practices* published by the Land Trust Alliance in 2004; and,

WHEREAS, the [organization] agrees that *Land Trust Standards and Practices* are the ethical and technical guidelines for the responsible operation of a land trust;

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Directors of the [organization], hereby adopts *Land Trust Standards and Practices* as guidelines for the organization's operations and commits to making continual progress toward implementation of these standards and practices.

_____

DATE ADOPTED

Notes

Additional Resources

Nonprofit Resources

The following nonprofit centers and nonprofit resources may be helpful to you in discussing ethics in your land trust and developing, adopting and implementing a model ethics statement and statement of values.

The BBB Wise Giving Alliance (http://www.give.org) focuses on donors and the ethical and accountability standards they should expect from organizations that solicit contributions from the general public. The Alliance produces in-depth evaluative reports on national charities based on its comprehensive *Standards for Charity Accountability* (2003). Alliance materials include an implementation guide to help donors and charitable organizations understand the Alliance's *Standards for Charity Accountability* and how the Alliance applies these standards in evaluating charities.

The Maryland Association of Nonprofit Organizations' Standards of Excellence (http://www.marylandnonprofits.org) strengthens and supports nonprofits' ability to serve the public while promoting the highest standards of ethics and accountability in nonprofit governance and management. MANO strives to increase recognition of, trust in and support for the nonprofit sector and to expand the influence of the nonprofit sector on issues that impact the people and communities it serves.

The Ethics Resource Center (http://www.ethics.org) is a nonprofit, nonpartisan educational organization whose vision is a world where individuals and organizations act with integrity. As the oldest nonprofit in the United States devoted to organizational ethics, ERC advances understanding of the practices that promote ethical conduct through research, measurement of ethics and compliance program effectiveness, and the development of white papers and educational resources based on overall findings. ERC also sponsors character development programs for educational institutions and a Fellows Program for corporate ethics officers and academics who engage in practical research that addresses emerging issues in corporations.

Independent Sector (http://independentsector.org) is a nonpartisan, 25-year-old leadership forum for charities, foundations and corporate giving programs committed to advancing the common good in America and around the world by sponsoring groundbreaking research; fighting for public policies that support a dynamic, independent sector; and creating resources so that staff, board and volunteers can improve their organizations and serve their communities. Resources from Independent

Sector that can help guide land trusts through many ethical situations include *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community*, (1991, revised 2002) and *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations* (2004).

The Land Ethic Toolbox (http://www.wilderness.org/AboutUs/LandEthicToolbox) of The Wilderness Society is for people who have fallen in love with wild places and want to help protect them and pass them on — healthy and intact — to future generations, whether they are in our backyards or part of our nation's most magnificent wilderness areas. Based upon a Leopoldian notion of a "Land Ethic," this toolbox provides critical thinking skills and tools, as well as resources that can be used to advocate for a range of ethical, empirical, spiritual, and ecological wildland values. It contains 31 exercises, some of which provide training in ethics and ethical decision-making for conservation professionals.

Land Trust Resources

The following values and ethics statements may be helpful to you in developing and tailoring ones to fit the mission and needs of your land trust. Each statement is summarized here, then presented in full on the page indicated.

Vermont Land Trust Credo (page 58)

The Vermont Land Trust Credo is the statement of values and ethics for this organization. Review it to obtain ideas that you can use when drafting a statement of values and ethics. You can use it to spark discussion on what values your land trust espouses. It is noteworthy because the Vermont Land Trust recognizes that its own internal behavior must reflect the core values of the organization — land trust employees aim to "walk the talk" in their day-to-day activities. Note that the Vermont Land Trust considers a good internal work environment a part of effective external relations.

The Nature Conservancy Values (page 59)

The Nature Conservancy's Values is a model statement of values and ethics that illustrates how a land trust will accomplish its mission. It is easy to see how these values will guide TNC's activities. Note how closely the organization links its values with its mission. When developing your own values statement, review your mission and think about what values are involved in implementing your mission. Closely connecting your values statement with your mission will help your land trust stay focused and achieve its priorities.

Jo Daviess Conservation Foundation Code of Ethics (page 60)

This code of ethics goes beyond a simple statement of values and is a good segue to chapter 2, "Dealing with Conflicts of Interest." It clearly defines what constitutes a conflict of interest and the obligation of each member of the organization to uphold ethical standards. The document describes in detail the responsibilities of board members and staff and provides them with clear parameters and a "code of conduct" within which to operate. This level of detail is valuable for board members and staff who may be uncertain about their ethical obligations. This document is also useful to have in hand when completing the conflict of interest policy in chapter 2.

Vermont Land Trust Credo

The Vermont Land Trust strives to be a working environment in which employees:

- Are personally committed to and work hard to fulfill the Land Trust's mission of protecting the productive, recreational and scenic lands that help give Vermont and its communities their distinctive rural character;
- Treat each other with respect and honesty, and work collaboratively to achieve mutual goals;
- Maintain a helping, "service" attitude toward people within, and clients of, the Land Trust;
- Present a positive, creative, personalized, professional approach to Land Trust clients and other members of the public;
- Look for opportunities to enhance the effectiveness of VLT and its working environment;
- Appreciate the good work, accomplishments and hardships of others in the organization, including both individual and collective successes and setbacks;
- Take the initiative and work constructively to candidly solve problems affecting them, enlisting the help of others when appropriate;
- Make effective use of the talents, resources, opportunities, and facilities of VLT to achieve organizational goals.

The Nature Conservancy Values

As indispensable to The Nature Conservancy's success as our unifying mission, vision, goals and measures are our unique values — the distinguishing attributes that characterize how we conduct ourselves in our drive for tangible, lasting results. These attributes are not mere platitudes but deeply held convictions universally manifested by all who represent The Nature Conservancy.

- Integrity Beyond Reproach
  We hold paramount the trust and responsibilities placed in us by our donors, members, colleagues, partners and the public.
- Continuity of Purpose
  We look to our mission to provide focus and guidance for everything we do, from our conservation initiatives to the allocation of our resources. We work in a cooperative, non-confrontational manner, emphasizing collaborative efforts and drawing on the best available conservation science.
- Commitment to People
  We respect the needs of local communities by developing ways to conserve biological diversity while at the same time enabling humans to live productively and sustainably on the landscape. We know that lasting conservation success requires the active involvment of individuals from diverse backgrounds and beliefs, and we value the unique contributions that each person can make to our cause.
- Effective Partnerships
  We are committed to forging public and private partnerships that combine diverse strengths, skills and resources.
- Innovation and Excellence
  We are strategically entrepreneurial in the pursuit of excellence, encouraging original thought and its application, and willing to take risks based on sound business judgment.
- One Conservancy
  We act as One Conservancy, with each program assisting other programs in reaching their full potential, thereby ensuring the success of the overall organization.
- Commitment to the Future
  We commit ourselves, individually and collectively, to leaving future generations a biologically rich world.

The Mission of The Nature Conservancy is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.

Jo Daviess Conservation Foundation Code of Ethics

The Jo Daviess Conservation Foundation adopts this Code of Ethics to protect its reputation and effectiveness by providing guidance to board and staff members in making decisions about their activities and conduct that may have ethical implications or pose a conflict of interest.

Definitions

"Foundation" when mentioned herein will refer to the Jo Daviess Conservation Foundation.

"Board" when mentioned herein will refer to the Foundation board of directors.

"Director" when mentioned herein will refer to a member of the Foundation Board.

"Staff" when mentioned herein will refer to all employees and contractors of the Foundation.

I. Conflict of Interest

A. Definition: A Conflict of Interest (referred to as "Conflict" below) is defined as any contract or other transaction between the Foundation and

1. a Director or a member of the family of the Director;
2. a director of a related organization, or a member of the family of a director of a related organization; or
3. an enterprise in which the Director, or a member of the family of the Director, is a director, officer, or legal representative or has a material financial interest.

B. Director's Obligations: Each Director has the following responsibilities and obligations.

1. To disclose to the Board the existence of any real or apparent Conflict. *The orientation process for new Board members will present this Code of Ethics and request disclosure of any current conflicts.*
2. To abstain from discussing any issue involving their Conflict, unless requested by the Board, or committee thereof, to give information on the issue.
3. To absent themselves from Board or committee discussions on any such project or transaction involving their Conflict unless requested by the Board or committee to give information on the issue.

4. To abstain from voting on any such issue related to their Conflict.
5. If so requested by the Board, to take a temporary leave of absence from the Board, until such time as the matter giving rise to the Conflict has been resolved.

C. Board Obligations: If a transaction or project of the Foundation involves a Conflict which is real or apparent, by a Director, the Board will do the following:

1. Approve of such project or transaction only if the Board makes specific findings that
    a. the project or transaction is both
        i. fair and benefits the Foundation and its objectives, and
        ii. is approved with the full knowledge of the economic benefit of the Director involved in the Conflict, and
    b. that the affected Director has not participated in the vote approving the transaction or project and was absent both during the related dicussions and at the time of the Board vote on the matter.
2. If the Board determines that the nature and magnitude of the Conflict warrants the same, the Board will request that the affected Director take a leave of absence from the Board.

D. Staff Obligations: Staff and volunteers will not engage in activities which represent a material or perceived conflict of interest as affects their roles with the Foundation.

II. Code of Ethics — Board and Staff

A. Accountability: The Board is the legal entity for the Foundation and is responsible for the formulation and maintenance of the Foundation's general policies and operational continuity.

Each Director must devote time and attention to the affairs of the Foundation to ensure that all Foundation actions, including those of Staff, are in accordance with its established bylaws. In establishing policies or authorizing activities, the Board must ensure that no policies or activities will jeopardize the basic not-for-profit status of the Foundation or will reflect unfavorably upon the Foundation as an institution devoted to public service.

B. Fiduciary Responsibility: The Board holds the fiduciary responsibility for the Foundation and for the protection of its assets. These assets include, but are not necessarily limited to, land holdings, physical facilities, financial assets, and the Staff itself.

C. Loyalty and Support: Directors should not attempt to act in an individual capacity. All actions should be taken as Board, committee, or subcommittee, and in conformance with the bylaws or applicable policies, procedures, and resolutions. Directors should work for the institution as a whole and not as advocates for particular activities or committees or outside interests.

Directors should be especially careful to keep Staff informed of all items about ongoing Board needs and plans and should refrain from making administrative decisions in any event.

Staff efforts will be guided by the Foundation mission, Board-approved strategy, committee-approved plans, bylaws, and policies. Unless they are representing a Foundation committee (or, in the case of the president, representing the Board), individual Board members will refrain from directing Staff efforts.

All Directors should contribute to the Foundation in time, services, or funds as best they can, encourage others to do so, and support its goals without reservation. The donation of goods or services by a Director, a member of a Director's family, or an enterprise in which a Director or a member of a Director's family has a material financial interest will not be considered a Conflict.

Directors will not offer business or professional services to the Foundation when doing so would create a Conflict.

Confidentiality: Directors and Staff should keep information learned during the course of Foundation activities in confidence when the information concerns the administration and activities of the Foundation that are not generally available to the public.

The Foundation's Executive Director has the sole authority to allow disclosure of member and donor information, and may use the Board for advice and counsel in this regard. In the special case of information pertaining to donated conservation easements and the donors' motives and status, the Executive Director will decide its disclosure after obtaining suitable permission from the donors and base the decision on the value to the Foundation of the disclosure. Directors are not to discuss donor information or landowner/land project details with anyone outside of the Foundation, except as has been disclosed to the public media at the discretion of the Executive Director.

Use of Resources: Directors and Staff and volunteers will not make unauthorized use of Foundation resources for private purposes.

Expenditure of Foundation funds will always be in accordance with applicable laws and consistent with the terms specified by the donor of those funds.

Gifts: Staff and volunteers will not solicit or accept for personal benefit, directly or indirectly, any gift, loan, service, or anything else of substantial monetary value from any person or firm which sought, or is seeking, assistance or other contractual business, or financial relations with the Foundation. Meals, accommodations, and travel services provided to the Staff on official business may be accepted as long as they are clearly in support of Foundation programs.

Property Purchase: Staff and Directors will not purchase from the Foundation any real estate or personal property having substantial value without prior approval of the Board.

Approved by the Jo Daviess Conservation Foundation

Recording Secretary _____Date_____

Check Your Progress

Before continuing on to the next chapter, check that you:

- ☐ Understand the importance of ethics to your land trust and why it is important to discuss ethics on a periodic basis;
- ☐ Know the extent to which your land trust is currently adhering to recommended ethical and accountability practices in the nonprofit sector;
- ☐ Know how to advance a discussion of ethics in your land trust;
- ☐ Be able to explain your land trust's ethical obligations to the public, donors, landowners, taxpayers, the land, and the land trust community;
- ☐ Be able to explain why it is important to act within the confines of the land trust's mission and to provide a public benefit;
- ☐ Be familiar with *Land Trust Standards and Practices* as the code of ethics for the land conservation community;
- ☐ Be familiar with Independent Sector's *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*; and
- ☐ Be able to work with the leadership of your land trust to craft a values statement for the organization and develop strategies for working with this values statement on an on-going basis.

Chapter Two · Dealing with Conflicts of Interest

Practice 4A: Dealing with Conflicts of Interest

The land trust has a written conflict of interest policy to ensure that any conflicts of interest or the appearance thereof are avoided or appropriately managed through disclosure, recusal or other means. The conflict of interest policy applies to insiders, including board and staff members, substantial contributors, parties related to the above, those who have an ability to influence decisions of the organization and those with access to information not available to the general public. Federal and state conflict disclosure laws are followed.

In its background to the standard on Conflicts of Interest in the 2004 revision of *Land Trust Standards and Practices*, the Land Trust Alliance notes that a land trust that operates as a tax-exempt organization (as most do) must operate in the public interest — not for the benefit of any individual. Both actual conflicts and perceived conflicts can damage a land trust's credibility. To avoid conflicts, a land trust should adopt and follow a written conflict of interest policy. A board member who thinks his or her participation in a board action could be viewed as a conflict should not attempt to influence that action, and should not be present for discussion on the issue. Staff members who think they may have a conflict should disclose their concerns to their supervisor or as described in the organization's conflict of interest policy. Other parties, such as major donors, may also have conflicts of interest, and the policy should state how those conflicts are addressed. An individual who perceives the likelihood of serious continuing conflicts should not serve on the board or staff, both for legal reasons and to preserve the land trust's credibility.

Conflict of Interest: A conflict of interest arises when a person in a position of authority in an organization, such as a director, officer, manager, or other "insider," is in a position, or perceived to be in a position, to be able to benefit personally (or create a benefit to a family member or other organization with which they are associated) from a decision he or she could make.

Conflict of Interest Policy: A conflict of interest policy consists of a set of procedures to follow to avoid the possibility that those in positions of authority over an organization may receive an inappropriate benefit.

To fully implement this practice, the Land Trust Alliance recommends:

- A land trust has a written conflict of interest policy that is followed.
- All board members and staff members have a copy of the policy, and subscribe to it in writing on an annual basis.
- That the policy require disclosure of potential conflicts, include a prohibition on conflicted parties discussing or voting on the issue (or being present during voting and the discussion preceding it), and require written documentation of each conflict.

Learning Objectives

After studying this chapter you should:

- Understand why it is essential to avoid or manage real or perceived conflicts of interest;
- Know how to advance a discussion of conflicts of interest (both real and perceived) in your land trust;
- Understand the societal and legal reasons for avoiding conflicts of interest (federal law specifics and state law generally);
- Understand a board member's basic legal duties and fiduciary responsibilities (duty of good faith, duty of care and duty of loyalty);
- Understand when a conflict of interest can be managed and when a conflict dictates the abandonment of a transaction or initiative or the severing of a relationship;
- Be able to explain the importance of a conflict of interest policy;
- Gain experience drafting a conflict of interest policy that specifically addresses:
  - Who is a potentially conflicted party;
  - How potential conflicts should be disclosed;
  - How to manage potential conflicts by specifying responsibilities of the potentially conflicted party and the organization; and
  - How to document actions taken in managing a potential conflict of interest;
- Develop strategies for implementing the conflict of interest policy in your land trust.

Summary

Land trusts have many opportunities for conflicts of interest to arise among their board members and staff — through real-estate transactions, management of finances and assets, business dealings, and advocacy activity, to name just a few. The fallout for the land trust from conflicts of interest can be serious. At worst, some, if mishandled, may result in a violation of the law, loss of tax-exempt status or a successful lawsuit against the land trust. At a minimum, your land trust may experience financial losses, loss of credibility in the community, and a corrosive atmosphere of distrust and decaying morale among the board and staff.

Conflicts of interest arise primarily from self-dealing and from opposing loyalties. Self-dealing includes conflicts in which a board member, staff member or other insider may financially benefit from his or her position with the trust. This situation is what is generally thought of, and usually is meant in legal terms, as a "conflict of interest." However, board members, staff members and other insiders may also find themselves with competing or opposing loyalties between their land trust work and other business or personal relationships. These kinds of conflicts have the potential for violating a board member's legal duty of loyalty to the organization and its mission under applicable state law.

In addition, a board member, staff member or other insider may be in a position in which his or her actions in professional or personal roles not associated with the land trust cause discomfort or loss of public credibility for the land trust. For example, a public official who serves on a land trust's board may have his or her bias called into question. A staff person with the land trust who serves as board chair of another land-saving group may be perceived as a representative of his or her employer. These situations may not amount to actual conflicts, but they can cause public perception problems for the land trust. The perception of a conflict of interest can often be as damaging to the land trust's reputation as an actual conflict of interest and, as such, needs to be addressed with care.

Avoiding actual and perceived conflicts of interest can be difficult. Board members need to know the law on conflicts and take appropriate steps in dealing with them. This chapter provides the necessary background and guidance.

This chapter begins with a self-assessment of your conflict of interest practices, followed by a discussion of conflicts of interest and a case study of The Nature Conservancy's recent revisions to its conflict of interest policy. Undertaking this assessment and reviewing the background

information will help you determine what your land trust needs to do in developing and implementing its conflict of interest policy.

The main portion of this chapter focuses on the steps your land trust should take in developing, adopting and implementing a conflict of interest policy. There are discussion questions and a template that will guide your land trust through the process of creating your own conflict of interest policy. The chapter concludes with a short "Putting It into Practice" exercise that gives you some practice in implementing the policy — with more practice provided in chapter 3, "Transactions with Insiders."

Does Your Land Trust Have a Conflict of Interest Policy?

Self-Assessment Exercise

Conduct a quick assessment of your land trust's practices related to conflicts of interest, giving your organization one point for every "yes" answer. Scores are shown at the end.

Does your organization:

1. Have a written conflict of interest policy?
2. Is the policy posted on your website?
3. Does it define "conflict of interest"?
4. Does it specify the persons who are covered under the policy?
5. Does it require regular disclosure of information related to conflicts of interest?
6. Does it specify procedures for handling potential or actual conflicts of interest when they arise?
7. Is it signed annually by officers, directors and key employees of your organization?

If your organization scores:

7: Great. Keep it up and pass along your success stories and model policy to the Land Trust Alliance for others to learn from.

5–6: Good, but there's room for improvement.

0–4: Time to get serious. Engage your board, staff and volunteers quickly to help make the needed changes.

This chapter will help you and your land trust get serious about conflicts of interest.

Conflict of Interest Overview

Getting serious about avoiding and managing conflicts of interest in your land trust begins by understanding what a conflict of interest is, what persons in particular are more likely to be in a position to produce conflicts of interest for your land trust, and what can be the fallout from a real or perceived conflict of interest. The importance of this topic is illustrated by a case study from The Nature Conservancy and its recent revisions to its conflict of interest policy (see page 75).

A mission statement that clearly specifies the organization's public purpose is an important guidepost in ethical and conflict of interest discussions.

What Is a Conflict of Interest?

A conflict of interest arises when persons are in a position, or perceived to be in a position, to benefit financially (or create a benefit to a family member or other organization with which they are associated) by virtue of their position within the nonprofit organization.

Board members, staff members and other insiders may also find themselves with competing or opposing loyalties between their land trust work and other business or personal relationships. These kinds of conflicts have the potential for violating a board member's legal duty of loyalty to the organization and its mission. Such conflicts might involve:

- A board member's use of knowledge learned in the course of land trust business for his or her own personal or business interests — a concern particularly acute with board members who are developers, real-estate agents, attorneys, or who serve on other nonprofit boards.
- A board member taking personal advantage of an opportunity he or she knows would be of interest to the land trust — for example, purchasing a parcel of land that he or she believes the land trust would like to acquire.
- A board member involved in hiring a close friend or family member as chief staff officer.
- Special concessions from the land trust sought by a board member not available to others — such as fewer or less strict restrictions in a conservation easement than the land trust's norm, or lax monitoring or enforcement practices.

A mission statement that clearly specifies the organization's public purpose is an important guidepost in ethical and conflict of interest discussions. Keeping the land trust's public purpose in the forefront can help the organization make choices that will benefit public rather than private interests.

Disqualified Person: A person who, at any time during the five years prior to the transaction, was in a position to exercise substantial influence over the affairs of the organization, including his or her family members and entities 35 percent or more of which are controlled by them. This will generally include directors and officers, except for honorary or nonvoting advisory board members, the CEO, and other executive staff. Under a facts and circumstances test, it could even include an organization's major donors. An organization manager is any officer, director or trustee of the organization, or any person with similar powers or responsibilities, including, potentially, an executive director

To reduce or eliminate the potential damage of conflicts of interest, land trusts should include in the definition of "insiders" all staff members and those with access to information not available to the general public (such as certain volunteers).

What persons may produce conflict of interest issues for your land trust?

Persons who may produce conflict of interest issues are typically "insiders": those persons who have an ability to influence decisions of the organization and who have access to information not available to the general public. How you determine whether a person is an insider is based on the situation and will generally depend on the level of influence that the individual has within the organization. Insiders can include board and staff members, substantial contributors, volunteers, and parties related to the above.

Legally, the IRS generally considers insiders or "disqualified persons" to be persons who, at any time during the five-year period ending on the date of the transaction in question, were in a position to exercise substantial influence over the affairs of the organization, a member of that person's family, and an entity in which those individuals own more than a 35 percent interest (so-called "35 percent controlled entities"; for more information see Internal Revenue Code Section 4958). Thus, insiders under the law generally include board members, key staff, substantial contributors (see IRC 507(d)(2)), parties related to the above, and 35 percent controlled entities. While these are strict definitions within the tax code, land trusts are advised to take an even more proactive approach to reduce or eliminate the potential damage that conflicts of interest may cause an organization and also include in the definition of "insiders" all staff members and those with access to information not available to the general public (such as certain volunteers). The term "related parties" is defined by the IRS to include spouses, brothers and sisters, spouses of brothers and sisters, ancestors, children, grandchildren, great-grandchildren, and spouses of children, grandchildren and great-grandchildren.

Legal Issues

There are several legal issues that are pertinent to the discussion of conflicts of interest. The following, which is adapted from the Land Trust Alliance's background to the standard on conflicts of interest in the 2004 revision of *Land Trust Standards and Practices* and a 1999 LTA *Exchange* article written by conservation law attorneys Bill Silverstein and Jessica Jay, is intended to provide land trusts and their advisors with some guidance on the relevant legal issues, but is not a definitive legal discussion of the topic. Each land trust should have its own counsel research its state's law on conflicts.

IRC Prohibition on Private Inurement and Private Benefit

The Internal Revenue Code contains statutory bans against private inurement and private benefit. With respect to private inurement, the IRC specifies that organizations exempt under Section 501(c)(3) must be organized and operated so that "no part of the net income [may] inure . . . to the benefit of any private shareholder or individual." The private inurement doctrine forbids the flow of assets from a tax-exempt organization, such as a land trust, to individuals with some significant relationship to the organization — the "insiders" described above. With regard to conflicts of interest, it prohibits, for example, the payment of excessive compensation, such as for staff or services, and the disposition or rental of property to board members or staff at less than fair market value.

Each land trust should have its own counsel research its state's law on conflicts.

The IRS and the courts, meanwhile, consider issues of private benefit within the context of the additional requirement that the 501(c)(3) organization be "organized and operated exclusively for charitable purposes." Public charities, such as land trusts, must serve a public rather than a private interest, and any benefit to private individuals must be incidental. Unlike private inurement, private benefit is not limited to circumstances in which benefits accrue to an organization's "insiders." Instead, private benefits go to "disinterested persons," or those unrelated to the organization's insider operations. As with private inurement, any benefit that is not a benefit for the public-at-large is subject to scrutiny; a finding of such benefit jeopardizes a nonprofit organization's tax-exempt status under Section 501(c)(3). The amount of private benefit that the courts have allowed has depended on the magnitude of the private benefit in relation to the public benefit derived from the activities in question, and whether the private benefit is necessary in order to advance the organization's exempt purposes.

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 inurement is absolute. The IRS also imposes penalties on directors, officers, key employees, and other insiders who engage in transactions that confer an excess benefit on the individual (the so-called "excess benefit transaction").

State Law

Standard of Care for Directors

Directors of a nonprofit corporation have the responsibility to manage the affairs of the organization. State laws generally impose a certain "standard of care" on directors performing this responsibility. This standard of care includes the following basic duties:

Duty of Good Faith — Directors must act in good faith. Directors demonstrate their good intentions by relying on proper documentation when making a decision, particularly a controversial decision.

Duty of Due Care — Directors must act with due care. Directors have the fiduciary responsibility to be careful when using

the money of the organization to carry out the organization's mission.

Duty of Loyalty — Directors must act in the best interest of the organization. Directors have the fiduciary responsibility to put the interests of the organization above their own interests.

Excess Benefit Transaction: A transaction in which a "disqualified person" (defined below), receives a benefit from an organization that is greater than the fair market value of the service, payment or property provided in return. Under federal tax law, if a public charity such as a land trust engages in a transaction with an organizational insider through which it confers an "excess benefit" (i.e., more than is reasonable) to the insider, an excise tax may be imposed on the insider and on the organization managers involved in the transaction.

Duty of Loyalty requires that board members, in conducting the organization's business, faithfully pursue the interests of the land trust over their own personal interests, financial or otherwise, or the interests of any other person or organization, including another land trust or conservation organization. Any opportunities for benefits or advantages based on service as a board member must accrue only to the organization, and never to the individual. Board members also must act "in good faith," which generally means acting with honesty, openness, and fairness.

Duty of Loyalty

Although each of these duties is important, the basic fiduciary duty of loyalty bears special emphasis when discussing conflicts of interest. The duty of loyalty requires a board member to have an undivided allegiance to the organization's mission. It bars a board member from using his or her position or information concerning the organization or its property (in the broadest sense) to secure a pecuniary benefit for himself. Furthering the financial interest of a third person — even if that third "person" is another charitable organization — may also violate the board member's fiduciary duty. Most of the court cases that have arisen related to alleged violations of the duty of loyalty deal with property transactions, investment or use of corporate assets to promote personal businesses of board members or those of related third parties, and appropriation for personal gain of opportunities suitable for the organization. For example, a violation arises when an opportunity presents itself — such as the purchase of real estate that would further the organization's goals — and a board member or officer takes advantage of his or her position to appropriate that opportunity for him- or herself, usually by virtue of superior access to information.

It is important to remember that the board member must, at all times, put the organization's interests ahead of his or her own. If an opportunity related to the organization's mission comes to a board member — *whether in his or her capacity as a board member or otherwise* — the board member must first disclose the opportunity to the organization and make it available to the organization before he or she pursues it or suggests it to a third party. For example, should a board member learn that a landowner is considering the sale of property that his or her land trust has identified in its conservation plan as being of high conservation value and worthy of protection, he or she should bring it to the attention of the board for consideration before attempting to purchase it.

State Statutes on Conflicts of Interest

To further empower these basic director duties of good faith, due care and loyalty, some state nonprofit laws have specific provisions that deal with conflicts of interest. The land trust's counsel should be thoroughly

familiar with the relevant state statutes. The generalized discussion provided here should be helpful for land trusts operating in states without such laws. The requirements and standards drawn from the statutes that do exist provide useful guidance for practical handling of conflicts.

State conflict statutes tend to deal only with a narrow band on the theoretical conflict spectrum, where the personal financial interest of a board member (including that of his spouse, dependents, and perhaps other family members and close associates) is involved. They also cover indirect financial interests through corporations and partnerships.

The board member must, at all times, put the organization's interests ahead of his or her own.

Depending on the statute, the board member is required to *disclose* to the organization material facts about conflicting interests (such as the extent of a board member's interest in a supplier of goods to the nonprofit organization) and the terms of the proposed contract or transaction. The full board or committee reviewing the transaction *must approve it by a disinterested majority* of board members without any conflicting interest. In approving, disinterested board members must exercise their normal "business judgment" or "duty of care"; they must believe rationally that the transaction is a proper one for the organization, despite its manifest benefits to their fellow board member. The transaction must be demonstrated to be *fair,* a standard more likely to be met if the organization has been independently represented in negotiating the terms of the transaction by an individual without any conflicting interest, and if the transaction was initiated by someone other than the interested board member. California law, for example, requires a finding by the board that a more advantageous arrangement could not have been obtained with reasonable effort under the circumstances.

State Laws Prohibiting or Restricting Loans

A majority of state nonprofit corporation laws flatly ban exempt organizations from making loans to their officers or board members. Others allow a few specific exceptions. Some allow loans if they attain some benefit for the nonprofit corporation or otherwise further some legitimate corporate objective. Of course, loans to an insider also can result in impermissible private inurement, such as loans made on insufficient security or at below-market interest rates.

Public Perception Issues

Land trusts almost certainly run a higher risk of suffering public relations and credibility problems from the appearance of conflicts of interest than they do of being successfully sued over an actual conflict. If not

managed properly, the perception of a conflict of interest can often be as damaging to the land trust's reputation as an actual conflict of interest. Several land trusts have experienced at least the appearance of conflict of interest that produced bad publicity, absorbed substantial board and staff time in trying to manage the public fallout, and, in several cases, resulted in lawsuits (generally unsuccessful).

For example, one small Washington State land trust discovered that it did not have a strong legal case after a landowner who had recently purchased an easement-restricted property took the land trust to court over a dispute involving the conservation easement. The land trust discovered that a landowner had cleared a septic drain field and put down a foundation for a house outside the allowed building envelope on an easement-protected property. The land trust contacted the landowner to discuss the situation, but in the midst of trying to negotiate a settlement, the landowner sued the land trust for relief. In court, the landowner convinced the judge that he had not understood the easement terms because they were inadequately explained during the closing on the purchase of the property. The landowner also raised the possibility of conflict of interest because the lawyer who handled the escrow at the sale was on the land trust's board of directors. While this was not an actual conflict, it did raise the appearance of impropriety, given the lawyer–board member's financial interest in the transaction. The judge agreed that the landowner had acted in good faith, saying that the landowner could not have been sure of the building envelope's exact location. In the end, the land trust and the landowner negotiated a settlement, which included officially designating a point of contact at the land trust to satisfy the landowner's desire for consistency in dealing with the organization. The land trust learned an important lesson: have a clear policy for disclosing and resolving any potential conflict of interest among land trust board and staff members.

It is imperative that a land trust develop and circulate among board, staff and volunteers written procedures for dealing with conflicts.

As this example shows, it is imperative that a land trust develop and circulate among board, staff and volunteers written procedures for dealing with conflicts — preferably with procedures that are stricter than those minimally required by law in order to manage both actual and perceived conflicts of interest.

The following case study from The Nature Conservancy also starkly illustrates the public relations and credibility fallout that can result from a series of negative articles on an organization's activities and the response required to manage such fallout. The purpose of the case study is not to imply either that *The Washington Post* was correct in all of its allegations

or that The Nature Conservancy was wrong in its practices. Rather, it illustrates how significant even appearances of conflicts can be and also describes the responsible and comprehensive steps The Nature Conservancy took to address the issues through, among other measures, a thorough review and revision of its conflict of interest policies.

Case Study: The Nature Conservancy

The world's largest private land conservation organization, The Nature Conservancy (TNC), found its conflict of interest policy and practices in the national media spotlight in May 2003 when *The Washington Post* published a series of articles criticizing TNC practices. The newspaper raised specific concerns about conflicts of interest, accountability and public disclosure. This media exposure eventually prompted independent investigations of the organization by both the Senate and the IRS, as well as a comprehensive self-review of TNC practices by an expert, independent advisory panel. This review resulted in a number of substantive changes to TNC's policies and practices, including changes to how the organization handles real and perceived conflicts of interest. While the level of scrutiny placed on TNC's policies may go significantly beyond what a more regionally or locally focused land trust might face, TNC's experience is a powerful example of how vital a well-conceived conflict of interest policy is to any charitable organization.

Immediately following the *Post*'s series, TNC responded by suspending a number of its questioned practices, including selling land to its trustees and all so-called "conservation buyer" real-estate transactions (those in which TNC would purchase property, attach a conservation easement, then resell it at its restricted value to a buyer willing to make a tax-deductible donation approximately equal to or more than the diminution in property value resulting from the conservation easement). TNC also suspended resource extraction activities on its nature preserves; cause-related marketing partnerships (those in which TNC would license its name and logo for placement on the products of for-profit companies); and the practice of extending loans to its employees. One month later, TNC permanently abandoned many of these practices and significantly restricted others, such as its conservation buyer program and cause-related marketing activities.

With scrutiny building on Capitol Hill, TNC empanelled a distinguished group of independent, outside experts to conduct a top-to-bottom, forward-looking review of the organization and its practices. TNC's board of directors specifically asked that the six-person panel

advise them on how best to achieve the organization's goal of being a recognized nonprofit sector leader in the areas of governance, transparency and accountability. The final report of the Governance Advisory Panel was of great value to TNC, but also benefits the entire nonprofit sector as its broader concepts and themes are largely applicable to any charitable organization.

In its report, the panel recognized that in the past years nonprofits have witnessed a dramatic shift in public expectations regarding the accountability of private organizations and the responsibilities of their governing boards. Ultimately, the panel recommended a number of sweeping changes, including cutting the number of board members in half; forming an executive committee with authority to act on behalf of the board between meetings; adopting new risk assessment and management policies; and redefining the role of trustees. With respect to conflicts of interest, the panel approved of TNC's 2003 conflict of interest policy revisions that prohibited the purchase or sale of land, easements or any other interests in land involving members of the board, trustees, employees, and their immediate families. The panel recommended that TNC's policy should prohibit members of the board, the executive committee or their companies from:

1. Taking an income tax deduction for any gift of land to TNC;
2. Purchasing land from, or selling easements to, TNC; and
3. Entering a cause-related marketing agreement with TNC.

The panel also recommended that TNC consider additional improvements originally suggested in an internal TNC memorandum, including that "major donors" be considered "covered persons," and thus subject to TNC's conflict of interest policy. Finally, the panel suggested that TNC hire a compliance director who would be responsible for ensuring TNC's operation in accordance with the law and its policies, and who would review specific transactions and events as they take place for adherence to those laws and policies.

A TNC document, *Overview of Reforms at The Nature Conservancy* (May 11, 2005; http://nature.org/aboutus/files/reforms_summary.pdf), summarizes the changes to TNC's conflicts of interest policy and practices since 2003 as follows:

- *Policy:* Expanded definition of "related parties" to include major donors and the immediate families of Board of Directors members, trustees, and staff.
- *Review:* Formation of a multi-disciplinary Staff Conflicts of Interest Committee.

- Sales and purchases of land and interests in land to or from Board of Directors members, trustees, staff, and the immediate families of these groups are expressly prohibited.
- Land and other transactions involving major donors are subject to advance review and approval under conflicts procedure.
- All conflicts involving Board of Director members, major donors or other insiders are referred to the Audit Committee of the Board.
- A Board member or his/her company may not claim a tax deduction for a gift of land unless the transaction is independently reviewed, scrutinized, and approved by Board of Directors.
- Board of Directors members and their companies cannot engage in cause-related marketing agreements with the Conservancy.
- Training programs have been initiated to enable staff to identify and address cases that involve even the appearance of a conflict.

TNC's actions, although the result of an unintended set of circumstances, have been extremely effective at countering the negative publicity generated by the media and government investigations. In fact, recent independent polling established TNC as one of the most trusted charitable organizations in the country. Given increased public expectations for accountability within nonprofit organizations and increased government scrutiny of the sector, all land trusts should similarly turn a critical eye on their own conflict of interest policies and practices. Having a written, well-conceived and up-to-date conflict of interest policy will help ensure that your land trust maintains public trust and avoids negative media and governmental scrutiny.

Questions

- Has your land trust had any conflicts or potential conflicts of interest that have appeared in your local paper? Have there been any conflicts or potential conflicts of interest that could have appeared in your local paper?
- What impact would a story like the one about TNC have on your organization if it were published in the local paper? How would it impact your members, fundraising and community support?
- Have you ever had conflict situations you wished you had managed differently? If so, what were they and what would you have done differently?

Developing, Adopting and Implementing a Conflict of Interest Policy

The best way to address conflicts of interest is to understand how they may arise; to make board members and others aware of the need to avoid conflicts; to require board members, staff and other insiders to disclose any potential conflicts; and to establish a policy for dealing with conflict problems as they occur. *Land Trust Standards and Practices,* Independent Sector and the IRS recommend that all nonprofits have a conflict of interest policy. The policy should specify to whom it applies, identify examples of conduct that raise conflict of interest concerns (such as a financial interest in a transaction, personal relationships that might unduly influence a land transaction or land management action, or being on the governing body of a contributor to the organization) and specify how conflicts should be disclosed and managed. Each board and staff member should be provided a copy of the policy, and be required to subscribe to it in writing. For example, the North Carolina Coastal Land Trust has developed a conflict of interest policy that:

- Defines what constitutes a conflict of interest;
- Provides specific examples of conflict of interest situations;
- Outlines the land trust's general procedures for resolving conflicts, and
- Contains specialized procedures for resolving conflicts involving the acquisition, sale or donation of an interest in land. (See "Additional Resources" at the end of this chapter for more about this policy.)

Handling conflicts on an as-needed basis can be extremely difficult. It tends to personalize decisions and either inhibit a frank exchange of views among board members or alienate them. It leaves open the possibility that the land trust will not adequately deal with a potential conflict, which could result in illegal actions and subject the land trust to public criticism. The board can decide on a case-by-case basis what constitutes a conflict of interest, but it needs a sufficiently clear way to handle potential conflicts when they do arise — one that is understood by all board members.

It is also rarely practical to keep off the board everyone who has potential conflict problems. Those who serve on land trust boards tend to be active, influential people who are involved in the community in a variety of ways, and thus have many crosscutting loyalties. Nevertheless, your

land trust probably should exclude people with extreme conflicts — the mother of the chief staff officer; local planning commission members, if the land trust is actively involved in land use planning; maybe the major real-estate agent or developer who handles undeveloped land. Cyril Houle, in *Governing Boards* (San Francisco: Jossey-Bass, 1997, p. 140), notes, "Appointments involving such extreme cases of potential conflict have sometimes worked out well, but it is usually prudent to assume that they will not." Aside from causing potential legal problems and continuing internal tensions, there are serious practical difficulties with board members with extreme conflicts. They may have to refrain from participating in discussions and voting to such an extent that they cannot function effectively as board members.

Handling conflicts on an as-needed basis can be extremely difficult. It tends to personalize decisions and either inhibit a frank exchange of views among board members or alienate them.

In its background to the standard on conflicts of interest in the 2004 revision of *Land Trust Standards and Practices*, the Land Trust Alliance summarizes the elements of a good conflict of interest policy. A conflict of interest policy can be relatively simple and straightforward and need not be a burden on the trust's operations. A policy should at a minimum reflect the standards of the law of the state(s) in which the land trust does business, and *should be reviewed by legal counsel to be sure the policy meets all applicable legal requirements.* A conflict of interest policy should include the following standard elements:

Disclosure. The policy should require prompt disclosure, preferably in writing, by board members, officers, staff and other insiders when any real or apparent conflicts are thought to exist.

Recusal from vote and generally from discussion. Recusal may be beyond the requirements of the law, but is so common and advisable as virtually to be required for sound operations. As Daniel Kurtz notes in *Board Liability* (Mount Kisco, NY: Moyer Bell, 1988, p. 65):

> [W]hile the law usually . . . does not preclude [an interested director's] participating in discussion and debate, there seems to be little good reason for allowing this participation. Either his participation is unnecessary for review and approval, in which case it is, at best, superfluous, or it is essential for approval or at least persuasion, in which case that is exactly the consequence that the law seeks to proscribe.

Fairness to the land trust. For any transaction involving financial arrangements, the policy should require that the arrangement be fair to the land trust. Procedures range from formal, competitive bidding on major contracts to comparison-shopping by obtaining informal price quotes for common goods and services. If placement of investments is

an issue, the land trust should consider having its investments handled by an unrelated outside manager. The land trust should have a disinterested party represent it in negotiating the terms of and implementing any transaction in which a conflict is present. The land trust should certainly consider adopting the standard in California law that requires a finding by the board — by vote of the board and documented in the minutes of a meeting — that a more advantageous arrangement could not have been obtained with reasonable effort under the circumstances.

Explanation and enforcement of the policy. When introducing new board members to the land trust, the policies dealing with possible conflicts of interest should be explained, as should the expectation of full disclosure, withdrawal from discussion or decision-making on sensitive subjects, and so forth. It is good practice to have every board and staff member sign the conflict of interest policy. Some organizations also have a standard process of annual notification and opportunity for disclosure, which helps remind board members, staff members and other insiders of the policy and their responsibilities under it.

Written documentation. In addition to the written disclosures suggested above, the land trust should document the actions it takes to manage a conflict of interest. The board minutes should reflect if there was a potential conflict and how it was addressed. A few land trusts use a practice of asking if there is a conflict of interest before every board vote and document the absence of conflict in the minutes.

The best policy still does not assure that conflicts will not occur. Cyril Houle, in *Governing Boards* (p. 141), notes:

> It may sometimes happen, despite these safeguards, that a trustee appears to be putting a private interest ahead of that of the institution. If the offense is not very serious, it may be handled by a casual comment ("Jack, be sure you don't tell your brother what we've decided.") that lets the possibly errant trustee know that he is being watched. If the problem has greater magnitude, serious measures will need to be taken, all the way to a request for a formal inquiry into what is going on. Such drastic measures are never pleasant, ending, as they can, in lifelong enmity; but those who let matters ride may well find themselves in a courtroom facing the charge that they have been negligent in carrying out the duties entrusted to them.

Notes

Developing and Adopting a Conflict of Interest Policy

This exercise is the central and most important exercise in this course. The conflict of interest template provided here allows you to create a conflict of interest policy tailored to the needs and special circumstances of your land trust.

The exercise is designed for use in instructor-led training and self-study. It is also designed for use by a land trust committee tasked with developing a conflict of interest policy. If used for self-study, you should first consider the questions concerning conflicts of interest preceding the conflict of interest template and then work through the template itself. Guidance on possible answers to the questions concerning conflicts of interest and on tailoring the template conflict of interest policy are interspersed throughout the exercise.

PART I: Questions Concerning Conflicts of Interest

Review the Internal Revenue Service's *Instructions for Form 1023 — Appendix A: Sample Conflict of Interest Policy* as well as sample land trust policies provided in Additional Resources (pages 97–105)and consider the following questions. Please note that the more detailed, complete and accurate your answers are, the better your preliminary conflicts of interest policy draft will be. Once you have answered the questions below, move on to part two, which contains a sample policy that you can edit, using answers to the questions in part one.

1. **What types of conflicts might occur in your organization?**

   Would your land trust ever have potential conflicts involving self-dealing, such as described in the examples below?

   - A land trust board or staff member, or his or her friends or family, is party to a transaction with the land trust — for example, selling land or a conservation easement to the land trust or renting property to or from it.
   - A board member holds an interest in a business that could benefit from the land trust's work (e.g., bank officer, president of a realty company that might handle resale of a land trust's restricted lands).
   - A board member renders professional services needed by the trust — legal, land planning, appraisal, financial — and is compensated for doing so.

Would your land trust ever have potential conflicts involving opposing loyalties, such as described in the examples below?

- A board member makes use of knowledge gained in the course of land trust business for his or her own personal or business interests (e.g., a realtor on a land trust board using the information that a potential conservation easement may be placed on land next to a property on the market to encourage potential buyers and thereby increase his or her business).
- A board member takes personal advantage of an opportunity he or she knows would be of interest to the land trust (e.g., purchasing a parcel of land for sale that he or she believes the land trust would like to acquire).
- A board member influencing employment decisions to hire a close personal friend.
- A board member seeking special concessions from the land trust on behalf of him- or herself or others (e.g., restrictions in a conservation easement that are less strict than the land trust's norms for easement-restricted land).

2. **Who in your land trust might be a conflicted party? Consider board, staff, significant donors, and their relatives, as well as land trust volunteers.**
   - Who is in a position to influence your land trust's major financial or transactional decisions?
   - Who has access to information about your land trust that others might not have?
   - Who is involved in other civic or professional activities within the community in which your land trust does business that pose potential conflicts with the activities of your land trust, including serving on the board of a "competing organization"?
   - Who has real-estate or financial interests related to the purpose of your organization?
3. **What are the obligations of a conflicted party?**
   - When should a real or potential conflict of interest be disclosed?
   - To whom should disclosure be made (board chair, president or executive director)?

- How should the disclosure be made (written, verbal)?
- What should happen after disclosure (abstain from discussion, abstain from vote, leave room, step down from board, resign from conflicting activity)?

4. **What are the obligations of the board?**
   - What findings should be required before the board approves a transaction with a conflicted party (benefit to the land trust, no more advantageous arrangement could reasonably be made, competitive bidding, comparison shopping)?
   - What should the board do if there is a person with repeated conflicts?
   - How should violations of the policy be handled?
5. **What procedures will minimize any public perception of impropriety when your organization faces a real or perceived conflict?**
   - How should the board document its actions (in minutes, in other ways)?
   - What specific documentation should be kept regarding the handling of conflicts (copies of disclosure statements, signed copies of conflicts policies, any other documents)?
   - To whom should the documentation be available and under what circumstances?
   - How should your organization ensure that board members, staff and others (such as volunteers) are familiar with your conflict of interest policies (policy provided at hiring, written acknowledgement of policy, annual signatures and disclosure sheets)?
   - How often and by whom should your organization's conflict of interest policy be reviewed and revised (once a year, once every five years or some other time frame)?
   - Should your organization's conflict of interest policy be publicly available through its website?

With the materials provided in Additional Resources (page 96) and your answers to questions 1–5 in mind, complete the following conflict of interest policy template. It is designed to help you think through the key points necessary for a successful conflict of interest policy tailored to your land trust. By completing

this template, your land trust will have taken the important first steps in creating a conflicts policy; however, the policy will be complete and fully useful to your land trust only after legal review. *The Land Trust Alliance strongly encourages you to seek legal counsel on your policy before adopting it.*

PART II: Conflict of Interest Policy Template

Your conflict of interest policy should begin with a statement of purpose that discusses the goals of the policy and the principles it relies upon. The statement of purpose is particularly important because your land trust's policy on conflicts must be consistent with your organization's mission. All decisions made under this policy will follow from this crucial section. Add here any additional clauses specific to your land trust and its mission.

Article I: PURPOSE

_____'s effectiveness depends upon maintaining the highest levels of credibility, confidence and trust with the community it serves and all parties with whom it works. For this reason, it is crucial that_____ ____ have responsible, well conceived conflict of interest policies and procedures to avoid real or perceived Conflicts of Interest.

All persons associated with _____ are reminded that the decisions and activities of the board of directors and staff, whether or not addressed in this policy, are governed by an overriding requirement of honesty, good faith and fiduciary responsibility for the organization and to the community it serves.

This policy is intended to supplement but not replace any applicable state or federal laws governing Conflicts of Interest applicable to charitable trusts.

Article II: DEFINITIONS

1. Conflict of Interest: A Conflict of Interest exists where a Covered Person (as defined below) has a material Financial Interest (as defined below) in a transaction or project under consideration by a board or committee of _____, or when that person proposes to act on any issue, matter or transaction in which _____ has an interest, and in which the Covered Person may have an interest separate from that of _____ .

A Conflict of Interest may also exist in situations in which there is an appearance that a Covered Person is utilizing, for his or her own benefit, inside information that is proprietary to _____, is acting in his or her own interest rather than the best interest of_____, has the ability to exercise undue influence over _____ decisions, or is receiving favorable treatment by _____ because of his or her status as a Covered Person.

Add here any additional clauses specific to your land trust based on your answers to question 1, listing particular types of conflicts of interest your organization may be susceptible to.

2. Covered persons:

a. Any director or officer of _____.

b. Any staff member of _____ (if a staffed organization).

c. Any substantial contributor, _____ or other land trust associate (such as a volunteer) with an ability to substantially influence the financial and transactional decisions of _____.

In (c), above, or elsewhere, add any additional clauses specific to your land trust based on your answers to question 2, listing individuals in your organization who might experience real or perceived conflicts.

3. Financial Interest: A Covered Person has a Financial Interest if the person has, directly or indirectly, through business, investment or family (including a spouse or domestic partner, or a child, sibling or parent [and the spouses of them]):

a. An ownership or investment interest in any entity with which _____ _____ has a transaction or arrangement; or

b. A compensation arrangement with _____ or with any entity or individual with which _____ has a transaction or arrangement; or

c. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which _____ is negotiating a transaction or arrangement.

Article III: PROCEDURES

1. General Guidelines: All Covered Persons shall avoid Conflicts of Interest involving their duties to _____ and any other interest or organization to which they have a duty, or any activity in which they are financially or otherwise interested. It is expected that all Covered Persons will conduct themselves under strict rules of honesty and fair dealing between themselves and _____. Such persons shall not use their position or knowledge gained during their association with _____ for their private benefit (or the benefit of their family) nor to obtain an unfair advantage over any aspect of their dealings with _____.

2. Duty to Disclose: In connection with any actual or possible Conflicts of Interest, a Covered Person must disclose the matter _____ _____ [in writing].

Add here clauses specific to your land trust based on your answers to question 3, detailing when, how and to whom any required disclosures should be made.

3. Determining Whether a Conflict of Interest Exists: After disclosure of the actual or potential Conflict of Interest, and after any discussion with the disclosing person, he or she shall leave the board or committee meeting while the determination of a Conflict of Interest is discussed and voted on by the remaining board or committee members.

Make any changes here that reflect the practices to be followed in your land trust. Note if staff conflicts disclosures (often to the chief executive) are managed differently than board disclosures.

4. Procedures for Addressing the Conflict of Interest: When a transaction or arrangement of _____ involves an actual, potential or perceived Conflict of Interest with a Covered Person, the board or committee shall act as follows:

Add here additional clauses specific to your land trust based on your answers to question 4, listing obligations of the board when a conflict is found. This section should, at a minimum, require a conflicted party to recuse himself or herself from discussion and voting, and may optionally include provisions such as a required finding of fairness to the land trust, competitive bidding, comparison shopping, use of outside experts, a finding that no more advantageous arrangements could reasonably be found, or leave of absence/resignation provisions.

5. Violations of the Conflict of Interest Policy: If the board or committee (or other person responsible for administering the policy — such as the chief executive with respect to staff conflicts) has reasonable cause to believe that a Covered Person has failed to disclose actual or potential conflicts of interest, it shall inform the Covered Person of the basis for such belief and afford the interested person an opportunity to explain the alleged failure to disclose.

If, after hearing the response of the Covered Person and making such further investigation as may be warranted under the circumstances, the board or committee determines that the Covered Person has in fact failed to disclose an actual or potential Conflict of Interest, it shall _____.

Add here additional clauses specific to your land trust based on your answers to question 4, detailing appropriate disciplinary and corrective action your organization should take in response to violations of the conflict of interest policy.

Article IV: RECORDS OF PROCEEDINGS

The minutes of the board and all committees with board-delegated powers shall contain the following:

Add here additional clauses specific to your land trust based on your answers to question 5, detailing how your organization should document the implementation of the conflict of interest policy. Note if staff conflicts disclosures (often to the chief executive) are recorded differently than board disclosures.

Article V: PERIODIC REVIEWS

Include this section any additional clauses based on your answers to question 5, detailing how and when your conflict of interest policy should be reviewed and updated to minimize any public perception of impropriety. Also note that, in conducting such periodic reviews, your organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the board of its responsibility for ensuring that periodic reviews are conducted.

Article VI: ANNUAL STATEMENT

All Covered Persons shall receive and must sign an annual statement providing that:

As a director, officer, staff member, substantial contributor, or other_____ associate with an ability to influence _____'s decisions, I hereby acknowledge that I have received a copy of _____'s Conflict of Interest Policy; I have read and understand the policy; I agree to comply with the policy; and I understand that _____ is a charitable organization and that in order to maintain its federal tax exemption it must engage in activities which accomplish one or more of its tax-exempt purposes.

Printed Name: _____

Signature: _____

Date: _____

Include this section, as modified specifically for your land trust based on your answers to question 5, detailing how your organization should ensure that board members and staff are familiar with the conflict of interest policy. Some organizations also include a standard conflict disclosure form.

Also consider how and where the executed statements should be kept. Note that if an organization has a policy requiring signatures and signed forms are missing, an outside auditor is required to report that fact in connection with its audit. (For more information on proper records storage, consult the Land Trust Alliance's course, "How to Comply with Nonprofit Law and Create Sound Records.")

Implementing the Policy — Exploring Conflicts of Interest and Appropriate Responses

This exercise is designed for use in instructor-led training, self-study and in-house land trust training and discussion.

Consider how a well-drafted policy might help a land trust respond to the hypothetical conflict of interest scenarios presented below. Scenarios 6 through 8 are taken from The Nature Conservancy's conflict of interest policy; scenarios 9 and 10 are taken from the Vermont Land Trust's conflict of interest policy. Guidance in handling the hypothetical conflict of interest scenarios begins on page 92.

Ethical Situations

Scenario 1: Board member A is spending a great deal of time as the board chair, and the land trust would like to offer her payment for her services.

Scenario 2: Board member B has been charged with retaining a new accountant for the land trust. Board member B's wife is a partner at an accounting firm with an impeccable reputation and substantial experience working with charitable organizations. Board member B recommends hiring his wife's firm. Assume that the role of the accounting firm is to audit the land trust's finances on a one-time basis.

Modified scenario: Assume board member B is the treasurer of the land trust.

Modified scenario: Assume that the land trust would like to employ the accounting firm to prepare its Form 990s on a regular and ongoing basis.

Scenario 3: Board member C is a lawyer and she reviews all the land trust's transactions for a modest fee that is budgeted every year.

Scenario 4: The land trust employs D as executive director; he has performed very well in that role. As part of his compensation for the coming year, executive director D proposes that the land trust provide him a low-interest loan to allow him to purchase a home in the area. If the land trust cannot do so, executive director D says that he will be forced to find an executive director position with another land trust in a region where home prices are more affordable.

Scenario 5: Board member E proposes to donate a conservation easement to the land trust. The board member wants a different, more landowner favorable, version of the land trust's cost of enforcement provision in the easement, or some other drafting concession.

Scenario 6: F, a land protection specialist for the land trust (or a board member serving in this role), is negotiating to acquire a critical natural area from the AA Corporation. The AA Corporation invites F to use AA Corporation's mountain retreat for a weekend getaway. The value of the use of the mountain retreat to F is in excess of $100.

> **Modified scenario:** Assume the same facts, except the real-estate director of the AA Corporation will be using the retreat at the same time as F. In addition, F and the real-estate director have decided that they will hammer out the final details of negotiations while at the mountain retreat.

Scenario 7: BB Corporation is selling property to the land trust at fair market value. The land trust's board member, G, is also a member of the board of BB Corporation. G appraises the property for BB Corporation.

Scenario 8: H sits on the board of both the land trust and CC Corporation. CC Corporation owns land that is of great ecological interest to the land trust. Through the intervention of H, CC Corporation is willing to sell this property to the land trust at a substantial discount (confirmed by independent appraisals).

Scenario 9: The daughter of I (trustee, officer or employee of the land trust) is searching for property on which to build a new home. I knows that the Smiths have contacted the land trust confidentially about donating a conservation easement next year. I tells his daughter about the Smiths' plans, and she then arranges the purchase of property adjacent to the Smiths.

Scenario 10: J (trustee, officer or employee of the land trust) has been asked to make a number of year-end visits to major land trust supporters. During the course of one such visit, Mrs. Smith writes a generous check to the land trust. J, also a member of Acme Charity's board, has also been requested to help plan a fundraising campaign for Acme. J states during an Acme campaign planning meeting that Mrs. Smith (otherwise unknown to Acme) is a good prospect.

Reasonable Compensation: The amount that would ordinarily be paid for like services by like organizations under like circumstances as of the date the compensation arrangement is made. Reasonable compensation is important because excessive benefits in the form of compensation to disqualified persons may result in the imposition of excise taxes and jeopardize the organization's tax-exempt status.

Guidance

Scenario 1

Board member A would be a covered person with a conflict of interest under the land trust's conflict of interest policy. Therefore, the land trust must follow its conflict of interest procedures in deciding whether to pay board member A for her services and what reasonable compensation would be under the circumstances. Board member A must recuse herself from the discussion and the vote.

The land trust should, however, think twice about compensating the board chair for her professional services. Practice 4B of *Land Trust Standards and Practices* advises that the board's presiding officer (board chair or president) and treasurer never be compensated for professional services. The presiding officer has a more visible role than does any other director. Typically, he or she sets meeting agendas and is a spokesperson for the land trust, representing the organization to funders, the media and the general public. For this person also to be paid would put the land trust in a difficult position if the business arrangement fails to work well or fails to produce expected results. What if there is a dispute over billing or the work quality? Will the board exercise the same degree of oversight with one of its own as it would in a purely business relationship? How uncomfortable would that be? Could it divide the board? And what would be the impact on public opinion or on the board and staff's valuable time and energy if the land trust gets embroiled in a dispute over compensation with its most visible board member?

Scenario 2

Board member B would be a covered person with a conflict of interest under the land trust's conflict of interest policy. Therefore, board member B would need disclose the potential conflict, and the land trust must follow its conflict of interest procedures in deciding whether to employ the accounting firm of board member B's wife. Board member B must recuse himself from the discussion and the vote. The land trust might reasonably decide to engage the accounting firm, assuming board member B has taken no part in the decision to retain this firm and the land trust has determined that the fee is fair and reasonable.

The land trust should not retain the accounting firm of board member B's wife if board member B is the treasurer of the board. Similar to the presiding officer, the treasurer has leadership responsibilities beyond those of other board members. As the director who oversees the land trust's financial affairs, the treasurer has board responsibility for preparing budgets and overseeing audits and would appear to have an unresolvable conflict between his fiduciary duties as treasurer and the financial interest of his family in the accounting firm doing the audit.

The land trust should also think twice about retaining the accounting firm of board member B's wife for regular and on-going accounting services, given the appearance of conflict that may be associated with the relationship. This would especially be the case if the accounting firm is small and board member B's wife is likely to provide the accounting services herself.

Scenario 3

Board member C would be a covered person with a conflict of interest under the land trust's conflict of interest policy. Therefore, the land trust must follow its conflict of interest procedures in deciding whether to employ board member C. Board member C must recuse herself from the discussion and the vote. The land trust might reasonably decide to engage board member C, assuming she has taken no part in the decision, has the appropriate qualifications, and the land trust has determined that her fee is fair and reasonable.

The land trust and board member C should think twice, however, about the relationship. As a board member, board member C has fiduciary duties of good faith, due care and loyalty. These duties can conflict with board member C's legal responsibility to provide independent advice to the land trust. Both the land trust and board member C should consider whether board member C should continue to serve as a director or could better serve the land trust's interests solely as the land trust's counsel, thus eliminating any conflicts between her duties as a board member and as counsel to the organization, and any appearance of a conflict of interest.

Scenario 4

Executive director D would be a covered person with a conflict of interest under the land trust's conflict of interest policy. Therefore, the land trust must follow its conflict of interest procedures in evaluating

the request of executive director D and consider any private inurement that could result from the proposed loan (for example, if the loan was made on insufficient security or at a below-market interest rate not factored into D's overall compensation package). Given the potential for private inurement and the appearance of impropriety, Independent Sector recommends that nonprofit organizations should not provide personal loans to directors or executive directors. Similarly, as a general rule, a land trust should not pay its executive director a salary or other compensation that is calculated as a percentage of the organization's net earnings. For example, a land trust must not pay its executive director a salary calculated as 5 percent of the organization's net income. This constitutes private inurement and could result in revocation of the organization's tax exemption.

Scenario 5

The land trust should follow its normal conservation easement acceptance and drafting procedures. In addition, as board member E would be a covered person with a conflict of interest under the land trust's conflict of interest policy, the land trust must follow its conflict of interest procedures in deciding whether to accept the conservation easement. Board member E must recuse herself from the discussion and the vote.

Scenario 6

F would be a covered person under the land trust's conflict of interest policy who may be acting in his own interest rather than the best interest of the land trust in making use of AA Corporation's mountain retreat. Therefore, F must disclose the potential conflict of interest, and the land trust must follow its conflict of interest procedures in deciding whether F may make use of the retreat. Unless there is a legitimate land trust reason for F to use the retreat for a weekend getaway, F should decline the offer. If F will indeed be negotiating the details of the natural area acquisition with AA Corporation's real-estate director during the weekend, F may accept the offer unless the land trust determines that it is important to the success and public perception of the negotiations that they take place on neutral ground.

Scenario 7

Board member G would be a covered person under the land trust's conflict of interest policy. Therefore, board member G must disclose the potential conflict of interest, and the land trust must follow its

conflict of interest procedures in deciding whether to purchase the property. The land trust should not rely on G's appraisal in determining the fair market value of the property, as it would not be a qualified independent appraisal of the property. Instead, the land trust should employ another appraiser, neither connected to the land trust nor BB Corporation, to substantiate the fair market value of the property.

Scenario 8

Board member H would be a covered person under the land trust's conflict of interest policy. Therefore, board member H must disclose the potential conflict of interest, and the land trust must follow its conflict of interest procedures in deciding whether to purchase the property. As the property is of great ecological interest to the land trust, and as CC Corporation is willing to sell the property to the land trust at a substantial discount (confirmed by independent appraisals), there appears no reason for the land trust not to proceed with the purchase.

Scenario 9

I would be a covered person, with inside information that is proprietary to the land trust, and therefore subject to the land trust's conflict of interest policy. I would be violating the land trust's conflict of interest policy by telling his daughter about the Smiths' plans unless he first discloses his intent to the land trust and the land trust grants him permission to do so.

Scenario 10

This scenario is more ambiguous, because the list of substantial contributors to the land trust (which would appear to include Mrs. Smith) will become public information upon filing of the land trust's Form 990. Therefore, unless there is some reason why disclosure of Mrs. Smith as a good prospect would be harmful to the interests of the land trust, J is probably free to disclose to Acme that Mrs. Smith is a good prospect (without necessarily disclosing how much she donated to the land trust). Note that Practice 5B of *Land Trust Standards and Practices* advises land trusts to honor donor privacy concerns (Accountability to Donors: The land trust is accountable to its donors and provides written acknowledgement of gifts as required by law, ensures that donor funds are used as specified, keeps accurate records, honors donor privacy concerns and advises donors to seek independent legal and financial advice for substantial gifts.).

Using Common Sense

A final thought from the Land Trust Alliance's supplementary materials on Practice 4A, "Dealing with Conflicts of Interest," in the 2004 revision of *Land Trust Standards and Practices*:

> Land trust board members are not paid, unlike trustees of investment trusts or board members of business corporations. While that does not excuse them from the duty of undivided loyalty, they should be encouraged to deal with conflicts on a common sense basis. Land trust board members share an interest in common — land conservation — and are frequently friends in the same community. Serious, actual transgressions are not likely, and when they occur, they are in most instances unintentional violations. Board members frequently are simply unaware of their duty of undivided loyalty to the land trust, or, having the best interests of the land trust at heart, do not realize how a potential conflict may be perceived in the community. Ensuring that board members are aware of their responsibility, and establishing a tradition of dealing openly, should go far in avoiding real or perceived conflicts of interest.

Using common sense is important whether your organization covers an entire region or a small community.

Additional Resources

Nonprofit Resources

The following resources may help your land trust directors fulfill their board responsibilities and manage conflicts of interest.

The Jossey-Bass Handbook of Nonprofit Leadership & Management, Robert Herman & Associates, eds. Second edition (San Francisco: Jossey-Bass, 2005). See chapter 9, "Ethical Nonprofit Management," by Thomas H. Jeavons.

Governing Boards: Their Nature and Nurture, Cyril O. Houle, (San Francisco: Jossey-Bass, 1997).

Board Liability: Guide for Nonprofit Directors, Daniel L. Kurtz, (Mt. Kisco, NY: Moyer Bell Limited, 1988). Although published some time ago, this book continues to provide very practical and useful information about board duties and responsibilities, including some real world case studies.

Sample Conflict of Interest Policies

After answering the questions in part one and completing the sample template in part two of exercise one, you may find it helpful to review the following sample conflict of interest policies in developing and tailoring an appropriate conflict of interest policy for your land trust.

- The Internal Revenue Service's Sample Conflict of Interest Policy
- General Conflict of Interest Policy for Tax-Exempt Organizations
- Forever Wild Land Trust (fictitious land trust) — Conflict of Interest Policy
- Chelan-Douglas Land Trust (Washington) — Conflicts of Interest Policy
- The Nature Conservancy — Conflicts of Interest Policy
- North Carolina Coastal Land Trust Conflict of Interest Policy
- Vermont Land Trust — Personnel Policy Addendum: Conflict of Interest Policy

IRS Sample Conflict of Interest Policy

(This policy is also available at http://www.irs.gov/instructions/i1023/ar03.html)

Article I: Purpose

The purpose of the conflict of interest policy is to protect this tax-exempt organization's (Organization) interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Organization or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

Article II: Definitions

1. Interested Person

Any director, principal officer, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

a. An ownership or investment interest in any entity with which the Organization has a transaction or arrangement,

b. A compensation arrangement with the Organization or with any entity or individual with which the Organization has a transaction or arrangement, or

c. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

Article III: Procedures

1. Duty to Disclose

In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest

a. An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.

b. The chairperson of the governing board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

c. After exercising due diligence, the governing board or commitee shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the governing board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Organization's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination it shall make its decision as to whether to enter into the transaction or arrangement.

4. Violations of the Conflicts of Interest Policy

a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.

b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV: Records of Proceedings

The minutes of the governing board and all committees with board delegated powers shall contain:

a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed.

b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

Article V: Compensation

a. A voting member of the governing board who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.

b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.

c. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

Article VI: Annual Statements

Each director, principal officer and member of a committee with governing board delegated powers shall annually sign a statement which affirms such person:

a. Has received a copy of the conflicts of interest policy,

b. Has read and understands the policy,

c. Has agreed to comply with the policy, and

d. Understands the Organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII: Periodic Reviews

To ensure the Organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.

b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Organization's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes

and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Article VIII: Use of Outside Experts

When conducting the periodic reviews as provided for in Article VII, the Organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.

General Conflict of Interest Policy for Tax-Exempt Organizations

Article I: Purpose

The purpose of the conflict of interest policy is to protect the interests of _____ (the "Corporation") when it is contemplating entering into a transaction or arrangement that might benefit the private interest of a director, officer or key employee of the Corporation, or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflicts of interest applicable to nonprofit and charitable corporations.

Article II: Definitions

1. Interested Person. Any director, officer, or key employee (e.g., the Corporation's chief executive officer, chief financial officer, or any other manager or supervisor identified by the Board of Directors or chief executive officer as exercising substantial influence over the operations of the Corporation) who has a direct or indirect financial interest, as defined below, is an interested person.

2. Financial Interest. A person has a financial interest if the person has, directly or indirectly, through business, investment or family:

a. an ownership or investment interest in any entity with which the Corporation has a transaction or arrangement, or

b. a compensation arrangement with the Corporation or with any entity or individual with which the Corporation has a transaction or arrangement, or

c. a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Corporation is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature. A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate board or committee decides that a conflict of interest exists.

Article III: Procedures

1. Duty to Disclose. In connection with any actual or possible conflicts of interest, an interested person must disclose the existence of his or her financial interest and must be given the opportunity to disclose all material facts to the directors and members of committees with board delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists. After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the board or committee meeting while the determination of a conflict of interest is discussed and voted on. The remaining board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest.

a. An interested person may make a presentation at the board or committee meeting, but after such presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement that result in the conflict of interest.

b. The chairperson of the board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

c. After exercising due diligence, the board or committee shall determine whether the Corporation can obtain a more advantageous transaction or arrangement with reasonable efforts from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably attainable under circumstances that would not give rise to a conflict of interest, the board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Corporation's best interest and for its own benefit and whether the transaction is fair and reasonable to the Corporation and shall make its decision as to whether to enter into the transaction or arrangement in conformity with such determination.

4. Violations of the Conflict of Interest Policy.

a. If the board or committee has reasonable cause to believe that an interested person has failed to disclose actual or possible conflicts of interest, it shall inform the interested person of the basis for such belief and afford the interested person an opportunity to explain the alleged failure to disclose.

b. If, after hearing the response of the interested person and making such further investigation as may be warranted in the circumstances, the board or committee determines that the interested person has in fact failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV: Records of Proceedings

The minutes of the board and all committees with board-delegated powers shall contain the following:

1. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the board's or committee's decision as to whether a conflict of interest in fact existed.

2. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection therewith.

Article V: Compensation

1. A voting member of the board of directors who receives compensation, directly or indirectly, from the Corporation for services is precluded from voting on matters pertaining to that member's compensation.

2. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Corporation for services is precluded from voting on matters pertaining to that member's compensation.

3. Anyone, including any board or committee member precluded from voting on compensation matters pursuant to section 1 or section 2, may provide compensation-related information to the board or a committee deliberating on compensation issues.

Article VI: Annual Statements

Each director, officer and key employee shall annually sign a statement which affirms that such person:

1. Has received a copy of the conflict of interest policy;

2. Has read and understands the policy;

3. Has agreed to comply with the policy; and

4. Understands that the Corporation is a charitable organization and that in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII: Periodic Reviews

To ensure the Corporation operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

1. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.

2. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Corporation's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Article VIII: Use of Outside Experts

In conducting the periodic reviews provided for in Article VII, the Corporation may, but need not, use outside advisors. If outside experts are used their use shall not relieve the board of its responsibility for ensuring that periodic reviews are conducted.

Adopted _____, 200__.

Annual Statement Regarding Conflict of Interest Policy

As an officer, director or key employee of _____ (the "Corporation"), I hereby acknowledge that I have received a copy of the Corporation's Conflict of Interest Policy; I have read and understand the policy; I agree to comply with the policy; and I understand that the Corporation is a charitable organization and that in order to maintain its

federal tax exemption it must engage in activities which accomplish one or more of its tax-exempt purposes.

Printed Name: _____

Signature: _____

Date: _____

Forever Wild Land Trust — Conflict of Interest Policy

(fictional land trust)

In order to encourage trustworthy decision-making and prudent behavior on the part of all those associated with Forever Wild Land Trust, the board of directors hereby adopts the following policy regarding conflict of interest.

Preamble

Forever Wild Land Trust's effectiveness depends upon maintaining the highest levels of credibility, confidence, and trust with the communities it serves and all parties with whom it works. It is essential to protect the organization's reputation for objectivity and fairness by identifying and appropriately dealing with actual, potential, and perceived conflicts of interest. All persons associated with Forever Wild Land Trust are reminded that the decisions and activities of the board of directors and staff, whether or not addressed in this policy, are governed by an overriding requirement of honesty, good faith, and fiduciary responsibility for the organization and to the communities it serves.

Definition of Conflict of Interest

A conflict of interest exists when a covered person (as defined below) has a material financial interest in a transaction or project under consideration by the Board of Directors or a committee of Forever Wild Land Trust or when that person proposes to act on any issue, matter, or transaction in which Forever Wild Land Trust has an interest, and in which the covered person may have an interest separate from that of Forever Wild Land Trust. A conflict of interest may also exist in situations in which there is an appearance that a covered person is utilizing, for his or her own benefit, inside information that is proprietary to Forever Wild Land Trust, is acting in his or her own interests rather than the best

interests of Forever Wild Land Trust, has the ability to exercise undue influence over Forever Wild Land Trust's decisions, or is receiving favorable treatment by Forever Wild Land Trust because of his or her status as a covered person.

Covered Persons

This policy applies to all employees, board members, members of board or advisory committees, major donors (individuals, corporations or foundations who make a gift or a pledge of $5,000 or more at any one time or $10,000 or more within a 5-year period), and individuals such as volunteers or former employees who, by virtue of their continued involvement with Forever Wild Land Trust, either have access to inside information that could place them in a conflicted situation or could give the appearance of having the ability to unduly influence Forever Wild Land Trust. The policy also applies to close relatives of these persons, including a spouse, domestic partner, child, sibling, parent, stepparent, parent- or sibling-in-law, grandchild, or grandparent.

General Guidelines

All persons shall avoid conflict of interest involving their duties to Forever Wild Land Trust and any other interest or organization to which they have a duty, or any other activity in which they are financially or otherwise interested. It is expected that persons subject to this policy will conduct themselves under strict rules of honesty and fair dealing between themselves and Forever Wild Land Trust. Such persons shall not use their position or knowledge gained during their association with Forever Wild Land Trust for their private benefit nor to obtain an unfair advantage over any aspect of their dealings with Forever Wild Land Trust.

Obligations of Covered Persons

Each covered person is obliged:

1. To disclose to the board, executive director, or committee of the board on which he or she serves, the existence of any actual, potential, or perceived conflict of interest. (Forever Wild Land Trust will provide forms for these disclosures.)
2. To abstain from discussing with board members, employees, or committee members any issue, matter, or transaction in which he or she has an actual, potential, or perceived conflict of interest unless specifically asked by the board or a board committee to give information on the issue, matter, or transaction.
3. To absent himself or herself from board and committee discussions on any issue, matter or transaction involving a conflict of

interest, unless requested by the board or committee to give information on the issue, matter, or transaction.

4. To abstain from voting on any such issue, matter, or transaction.
5. When requested by the board, to resign from the board of directors, advisory board or committee until such time as the matter giving rise to the conflict of interest has been resolved. When, in the opinion of the board president, the matter has been sufficiently resolved, the director may be invited to rejoin the board, advisory board or committee.

Obligations of the Board in Conflicted Situations

When a transaction, contract, or project of Forever Wild Land Trust involves an actual, potential, or perceived conflict of interest with a covered person, the board shall act as follows:

1. Approve such transaction, contract, or project only after making specific findings that:
    i. The transaction, contract, or project is fair and benefits Forever Wild Land Trust and its objectives; and
    ii. The transaction, contract, or project is approved with the board's full knowledge of its financial or other benefit to the covered person who has the conflict of interest;
    iii. When the covered person is a director, the director did not participate in the vote approving the transaction, contract, or project and was, in fact, absent both during the discussion of the transaction, contract, or project and when the board voted on it;
    iv. A more advantageous arrangement could not have been obtained with reasonable effort.
2. When warranted by the nature and magnitude of the conflict of interest, request that a conflicted member of the board of directors, advisory board, or other committee resign.

I have read and agree to abide by the Forever Wild Land Trust Conflict of Interest Policy.

_____

Signature Date

Chelan-Douglas Land Trust Conflicts of Interest Policy

All CDLT Board members shall receive a copy of this policy at the beginning of their term, and, if necessary, the policy shall be explained for their benefit. All CDLT Staff, at the date of hire, shall also read and understand the Conflicts Of Interest Policy.

Preamble:

Chelan-Douglas Land Trust (CDLT) Board Members, Officers, and Staff hold their positions for the benefit of the public and must always be conscious of public scrutiny and public perception. The appearance of a conflict of interest, or an actual conflict of interest, can arise in situations in which a duty to act in the public interest conflicts with an individual's opportunity to advance his or her own interest, or that of a family member, close friend, or business associate. An individual who perceives the likelihood of serious conflicts between a duty to serve the public benefit and that person's individual interests should not serve on the board or staff, both for legal reasons and to preserve the land trust's credibility.

Fiduciary Duty:

All Board members and Staff have a duty of fiduciary responsibility to the CDLT. Such fiduciary duty includes a duty to always serve the best interests of the CDLT, and to avoid actions that may subject the CDLT to legal liability or public criticism. A Board member who believes his/her participation in a CDLT action would result in a conflict of interests should not vote or participate in that action, and generally should recuse himself/herself from discussion on the issue, other than to provide objective information. This includes, but is not limited to, all instances where a Board member or members of his or her immediate family hold a real property interest or financial interest in a property which is the subject of a proposed CDLT action.

Duty to Disclose:

Board Member Disclosure to Board: In any situation where there is potential for an actual or apparent conflict of interest, a Board member has a duty to immediately disclose the situation to the Board. This includes, but is not limited to, all instances where a Board member or a member of his or her immediate family holds a real property interest

or financial interest in a property that is a legal abutter to the subject of a proposed CDLT action. The Board may determine on a case-by-case basis whether an actual or apparent conflict of interest precludes the Board member from participation in the action. If a simple majority of the disinterested Board members present at any meeting where a quorum is present determines that an actual or apparent conflict should preclude an individual from participation in an action, the conflicted Board member must abstain from discussion and voting on the issue, other than to provide objective information. In making such determination, the disinterested members of the Board must exercise their normal fiduciary duty of care to the CDLT.

CDLT Disclosure to Other Parties: In addition to internal CDLT disclosure, the CDLT must be aware that public credibility is instrumental for the organization's longevity. Thus, in all cases where a conflict of interest has been formally discussed in a Board meeting, the CDLT has a duty to disclose the fact and outcome of such discussion to all parties to the transaction.

Specific Conflicts to be aware of:

In particular, Board members must understand the following conflict of interest concepts:

1. Self-Dealing: Any situation where a Board or Staff member or any of their family members, close friends or business associates may appear to financially benefit from an action taken by the CDLT;
2. Opposing Loyalties: Any situation where a Board or Staff member has opposing or competing loyalties due to other business or personal relationships;
3. Loss of Public Credibility: Any situation where a Board or Staff member's actions in professional or personal roles not associated with the CDLT may cause discomfort or loss of public credibility for the CDLT.

Leave and Removal from the Board:

If the Board determines that a Board member has violated this policy, the Board may remove the Board member from the CDLT Board, in accordance with the provisions of the CDLT Bylaws Section 3.5(A) or 3.5(B).

The Nature Conservancy Conflicts of Interest Policy

Policy:

It is the policy of The Nature Conservancy to identify conflicts of interest involving The Nature Conservancy and related parties as well as situations which may give rise to an appearance of a conflict of interest and to address such conflicts and situations in a manner that will fully protect the integrity and reputation of The Nature Conservancy as well as related parties.

Purpose:

To assure and ensure that The Nature Conservancy will live up to its high fiduciary obligations and operate in compliance with our highest corporate value: "Integrity Beyond Reproach."

Origin:

Approved by the Board of Governors June, 1995. Revised March 15, 1996, October 2, 2002 and revised March 12, 2004 to delete former attachment which was revised and incorporated into a new Conflict of Interest standard operating procedure.

References, Resources, and Explantory Notes:

All Board of Governors members have read and signed. All staff and Chapter Trustees/Advisors will read, understand, and comply.

Refer to the President and to the Worldwide Office legal Function for additional information.

See Conflict of Interest standard operating procedure.

Conflict of Interest Standard Operating Procedure:

Introduction:

The Conservancy's effectiveness depends on its record of accomplishment and its reputation. The Conservancy's success results directly from maintaining the confidence of the individuals, groups, and organizations with whom it works. The Conservancy's greatest asset is its good name. For that reason, it is crucial that the Conservancy have a responsible and well-conceived Conflict of Interest policy and procedure. In addition, having a sound Conflict of Interest policy and procedure will help the Conservancy comply with the Standards for Charity Accountability

established by the BBB Wise Giving Alliance, the premiere charity watchdog organization in the United States. The policy and procedure will also help assure compliance with the Internal Revenue Service rules against private inurement and private benefit and with state statutes addressing conflict transactions.

One of the principal purposes of the Conflict of Interest policy and of this procedure is to help Conservancy staff and Board members identify and avoid or resolve conflicts of interest with The Nature Conservancy. For that reason, Conservancy employees and Board members must read and retain a copy of this Conflict of Interest Policy and Procedure at the outset of their tenure with the Conservancy and at such time as the policy or procedure is amended. There may be certain volunteers, such as Chapter Trustees, who, because of the level of their involvement in Conservancy business, and because of their access to inside information, are covered by this Conflict of Interest policy and must be fully informed of its contents. Any questions concerning the scope or possible impact of the Conflict of Interest policy or procedure upon any volunteers should be addressed to the Worldwide Office Legal Function. In addition, the Conflict of Interest policy and this procedure will be discussed at all orientation sessions for new employees and Board members.

This Standard Operating Procedure provides guidance in three areas:

1. Understanding conflict concepts and definitions;
2. Key questions to evaluate conflicts and potential conflicts; and
3. The Conservancy's administration and procedure for reviewing and managing conflicts.

I. Understanding Conflict Concepts and Definitions

A. Conflict of Interest: A conflict exists when a covered person (as defined below) proposes to act on any issue, matter, or transaction in which the Conservancy has an interest, and the covered person may have an interest separate from the Conservancy. A conflict of interest also exists in situations in which there is an appearance that a covered person is utilizing inside information that is proprietary to the Conservancy for his or her benefit, is acting in his or her own interests rather than the best interests of the Conservancy, has the ability to exercise undue influence over Conservancy decisions, or is receiving favorable treatment by the Conservancy because of his or her status as a covered person.

B. Covered Persons: All employees, Board members, Chapter Trustees/Advisors, and, as defined below, close relatives, major donors, related organizations, and other insiders.

C. Close Relative: Spouse, child (natural or adopted), parent and step-parent, in-laws, grandchild, grandparent, brother or sister of a covered person, and any person with whom a covered person shares living quarters under circumstances that closely resemble a marital relationship or who is financially dependent upon the covered person.

D. Inside Information: Any material information that is identified as confidential and proprietary, pertaining to the business and affairs of The Nature Conservancy, whether related to a specific transaction or to matters pertaining to The Nature Conservancy's interests, activities, and policies.

E. Major Donor: An individual, corporation, or foundation that makes a gift or pledge of $100,000 or more at any one time or cumulatively within a 5 year period prior to the occurrence of the conflict either in cash, appreciated securities, other assets or in land, easement, or bargain-sale value.

F. Other Insiders: Individuals, such as former BOG members, former Chapter Trustees, members of Conservancy advisory boards or committees, members of the President's Conservation Council, volunteers or former employees who, by virtue of their continued involvement with the Conservancy, either have access to inside information that could place them within a conflict situation or could give the appearance of such persons having the ability to unduly influence the Conservancy. Depending on the facts and circumstances, an independent contractor may be an "other insider" where that person or entity has access to inside information.

G. Related Organization: Any organization in which a covered person directly or indirectly:

a. owns or controls 5% or more of any voting security; or

b. is a director, executive officer, executor, administrator, trustee, beneficiary, controlling partner, or otherwise serves in a fiduciary capacity or holds a substantial beneficial interest; or

c. has legal or de facto power to control the election of a majority of directors; or

d. has legal or de facto power to exercise a controlling influence over the management or policies.

"Organization" includes a corporation, partnership, trust, estate, joint venture, and unincorporated affiliation of any kind as well as public boards and commissions and not-for-profit organizations.

II. Key Questions to Evaluate Conflicts and Potential Conflicts:

There are many difficult and ambiguous issues associated with the types of conflict issues that confront the Conservancy. In order to help those involved with Conservancy activities to understand and evaluate those actual and potential conflicts as well as situations that give rise to the appearance of a conflict, the following are typical categories of situations where conflicts might arise. While not all-inclusive, the following represent the great majority of types of conflict situations confronted by the Conservancy. Key questions and issues that must be addressed for each of these types of conflicts are set out below:

1. Hiring individuals who are close relatives of covered persons.
    - Is this job integral to the success of the Conservancy?
    - Have all Conservancy policies and procedures relevant to employment been followed?
    - Can this position be structured so that the conflicted party has no supervisory responsibilities with the employee without disrupting the Conservancy's business practices?
    - Will the conflicted party play any role in the hiring process?
    - Has the Conservancy assessed the public relations and political environment at all scales to be sure that this hire will not damage the Conservancy's reputation?
    - Does this person have a unique expertise that the service cannot be obtained anywhere else?
    - What are the alternatives if this person is not employed by the Conservancy?
    - Has the Conservancy balanced the financial benefits to the Conservancy with the reputational risk to the Conservancy of the hire?
    - How will this appear in the eyes of the public when tested against the value of "integrity beyond reproach?"
2. Contracting for products or services with covered persons.
    - Is this product or service integral to the success of the Conservancy?
    - Has the Conservancy taken appropriate measures to ensure that the Conservancy obtains the best market price for the work or services?

- Has the Conservancy received information from parties other than the conflicted party that address the quality of the service or products being acquired or provided?
- Has the Conservancy accessed the local public relations and political environment to be sure that this hire will not damage the Conservancy's reputation?
- Will the management of the delivery of the service or product within the Conservancy be done by someone other than the conflicted party or other than someone who is supervised by the conflicted party?
- How will this appear in the eyes of the public when tested against the value of "integrity beyond reproach?"

3. Purchases or Gifts of Interests in Land from or Sales of Interests in Land to Covered Persons.
    - For acquisitions, has the Conservancy determined that this is an interest in land that would be acquired by The Nature Conservancy regardless of ownership?
    - Has the proposed transaction been characterized accurately in the legal documents and with the public?
    - Have appropriate independent valuations been obtained in compliance with the Conservancy's Real Estate — Documentation of Value and Conservation Buyer Transactions procedures?
    - Has the proposed transaction been reviewed to ensure that appropriate conservation benefits are obtained?
    - Are the terms and conditions of the purchase sufficient to protect the land and on terms favorable to TNC?
    - Will the covered person obtain any direct or indirect economic benefit from the transaction and, if so, have such benefits have been properly reflected in pricing the transaction and determining values?
    - Has the transaction been structured to ensure that the Conservancy's standards of transparency will be achieved?
    - Does the transaction comply with the Conservancy's policy on Conservation Sales To or From Related Parties? (Note: There may be cases where the Conservancy will want to grant exceptions to that policy. The questions in this paragraph may be relevant for an analysis of when an exception may be appropriate.)

- For sales, has the Conservancy marketed the property in an open, equitable, and transparent marketing process?
- Has the Conservancy done a political and public relations assessment of the impact of this donation, purchase, or sale on the Conservancy's reputation.
- How will this transaction appear in the eyes of the public when tested against the value of "integrity beyond reproach"?

4. A covered person serving on public and/or private boards, commissions, or councils transacting business with the Conservancy or with which the Conservancy may have a potential adverse interest.
    - Is the covered person serving on the board of that entity as part of his or her job responsibility for the Conservancy?
    - Was there an advance disclosure and have both parties agreed that, in cases of conflict or where there was a direct and adverse interest/competition, there would be a mechanism for recusal, disclosure, or any other safeguards to protect the Conservancy?
    - Is there a plan in place for how staff will conduct themselves when serving on other Boards?
    - Will the individual's time spent working on issues for the other board take away from his or her ability to perform his or her job for he Conservancy and if so, what is the benefit to the Conservancy?
    - What impact will this service have on the Conservancy's ability to do its business and on the Conservancy's reputation?
    - Will any decisions made by the individual working for the other organization be made with regard to the Conservancy's best interests?
    - What are the costs and benefits to the Conservancy?
    - What are the alternatives, if any?
    - How will this appear in the eyes of the public when tested against the value of "integrity beyond reproach"?
5. Use of inside information by a covered person.
    - Is the information proprietary to the Conservancy?
    - What steps have been taken to protect the information?

- What are the costs and benefits to the Conservancy?
- Is there any private benefit or private inurement?
- What are the alternatives, if any?
- How will this appear in the eyes of the public when tested against the value of "integrity beyond reproach"?

In evaluating conflict situations in order to determine an appropriate course of action, the Conservancy shall be guided by the following criteria and considerations:

- Compliance with the letter and the spirit of all applicable laws relevant to all parties to the transaction;
- Adherence to Conservancy policies and procedures;
- Ability to act within the scope of the Conservancy's values, such as "integrity beyond reproach";
- Avoidance of private benefit and inurement;
- Transparency;
- Conservation benefits likely to be achieved;
- Consequence to the Conservancy from declining to participate;
- Financial or other benefit to the Conservancy;
- Nature and extent of risk to the Conservancy's reputation;
- Availability of other alternatives;
- Ability to mitigate reputational risks; and
- Financial or other benefits to the other party.

III. Conservancy Administration and Procedure for Reviewing and Managing Conflicts

Procedure: A member of the staff involved in a conflict or appearance of a conflict will disclose and bring the matter to the attention of his or her supervisor. The supervisor will bring the matter to the attention of the appropriate Conservancy attorney with a recommended course of action. Each request for approval of a proposed course of action will describe in detail the particular activity in question that gives rise to the conflict or appearance of conflict, the reasons why the proposed course of action should be approved, and any special circumstances surrounding the situation. The attorney will then submit the request to the General Counsel, along with a recommended course of action. The General Counsel will convene a Conflicts Review Committee as the final arbiter of the matter. The Committee will be comprised of the Director of External Affairs, the Director of Finance, the Chief Administrative Officer and the Chief Conservation Officer and the General Counsel and will review and

approve, approve with modifications, or disapprove the recommended course of action.

A Chapter Trustee/Advisor involved in a conflict or appearance of a conflict will disclose and bring the matter to the attention of the appropriate Operating Unit Director and Conservancy attorney who will work with the Chapter Trustee/Advisor to develop an appropriate recommended course of action, which will be reviewed and approved by the Chapter Board and which will then be submitted to the General Counsel. Each request for approval of a proposed course of action will describe in detail the particular activity in question that gives rise to the conflict or appearance of conflict, the reasons why the proposed course of action should be approved, and any special circumstances surrounding the situation. The General Counsel will bring such conflict and the recommended course of action to the above-referenced Conflicts Review Committee as the final arbiter of the issue. The Committee will review and approve, approve with modifications, or disapprove the recommended course of action. If a conflict involving a member of a Chapter Board of Trustees is brought to the attention of a Conservancy staff member, the staff member will immediately notify the appropriate operating unit director and the Conservancy attorney of the matter.

A member of the Board of Governors involved in a conflict or appearance of a conflict will disclose and bring the matter to the attention of the appropriate Conservancy attorney who will work with the Board member to develop an appropriate recommended course of action, which will then be submitted to the General Counsel. Each request for approval of a proposed course of action will describe in detail the particular activity in question that gives rise to the conflict or appearance of conflict, the reasons why the proposed course of action should be approved, and any special circumstances surrounding the situation. The General Counsel will bring such conflict and the recommended course of action to the above-referenced Conflicts Review Committee to review and ratify the recommended course of action or propose a course of action with modifications. The course of action recommended by the Conflicts Review Committee will be submitted to the Board of Governors Audit Committee as the final arbiter of the issue. The Audit Committee will approve, approve with modifications or disapprove the recommended course of action, as the final arbiter of the issue. If such a conflict involving a member of the Board of Governors is brought to the attention of a TNC staff member, the staff member will immediately notify the appropriate operating unit or functional department director and the Conservancy attorney of the matter.

If other insiders or major donors are involved in a conflict or appearance of a conflict, the other insider, major donor, or the Conservancy representative working with such individual will disclose and bring the matter to the attention of the appropriate Conservancy attorney who will work with the other insider or major donor to develop an appropriate recommended course of action, which will then be submitted to the General Counsel. Each request for approval of a proposed course of action will describe in detail the particular activity in question that gives rise to the conflict or appearance of conflict, the reasons why the proposed course of action should be approved, and any special circumstances surrounding the situation. The General Counsel will bring such conflict and the recommended course of action to the above-referenced Conflicts Review Committee to review and ratify the recommended course of action or propose a course of action with modifications. The course of action recommended by the Conflicts Review Committee will be submitted to the Board of Governors Audit Committee as the final arbiter of the issue. The Audit Committee will approve, approve with modifications, or disapprove the recommended course of action. If such a conflict involving an other insider or major donor is brought to the attention of a Conservancy staff member, the staff member will immediately notify the appropriate operating unit or functional department director and the appropriate Conservancy attorney of the matter.

Courses of Action: In all cases, conflicts of interest or circumstances giving rise to the appearance of a conflict must be disclosed in advance of initiating the activity giving rise to the conflict and in accordance with the procedures stated above. In developing responses to such conflicts, every effort will be made to avoid the conflict. In cases where it is not possible to completely avoid a conflict or the appearance of a conflict, reasonable efforts will be made to mitigate the effects of the conflict. At a minimum, the recommended course of action will ask the individual involved in the conflict to disclose the situation to the relevant parties and recuse and absent him/herself from any involvement in decisions pertaining to the conflict or the appearance of conflict. Before the conflict is disclosed and while the request for approval of a proposed course of action is pending or being considered, the individual involved in the conflict will refrain from participating in the questionable activity and/or withdraw from any discussion of or decision on the matter.

Conclusion:

Adhering to the Conflict of Interest policy and this standard operating procedure is a condition of association with The Nature Conservancy as an employee, Board member, or Chapter Trustee/Advisor. Violations of the Conflict of Interest policy and this procedure may be grounds for

dismissal as an employee or severance from the Board of Governors or a Chapter Board/Advisory group. The Audit Committee of the Conservancy's Board of Governors and the General Counsel will review and assess the Conflict of Interest policy and this standard operating procedure and their implementation on a regular basis and notify employees, Board members, and Chapter Trustees/Advisors of any changes and/or revisions thereto.

Purpose:

To assure and ensure that The Nature Conservancy will live up to its high fiduciary obligations and operate in compliance with our highest corporate value: "Integrity Beyond Reproach."

Origin:

Instructions for handling conflicts of interest were originally included as part of the prior Conflicts of Interest Policy. New as Standard Operating Procedure in March 2004.

References, Resources, and Explantory Notes:

See Conflict of Interest policy.

Refer to the President and to the Worldwide Office Legal Function for additional information.

EXAMPLES: For specific examples of conflict or perceived conflict situations see examples below.

EXAMPLE: X, who is a land-protection specialist for The Nature Conservancy, is negotiating to acquire a critical natural area from the Y corporation. X has developed a good working relationship with the real estate director of the Y corporation. The Y corporation invites X to use the Y corporation's mountain retreat for a weekend getaway. Assuming that the value of the use of the mountain retreat to X is in excess of $100, X is confronted with a potential conflict situation. For example, this arrangement could create the perception that X has received this benefit from Y corporation in exchange for some concession in the business negotiations. X should not accept this offer.

EXAMPLE: The facts are the same as above except the real estate director of the Y corporation will be using the retreat at the same time as X. In addition, X and the real estate director have decided that they will hammer out the final details of negotiations while at the mountain retreat. Although X's use of the mountain retreat in this instance is not a conflict situation, there still is a risk of a perceived conflict. Therefore, X still would have an obligation to disclose.

EXAMPLE: X is the head of the benefits program for TNC and is recruiting for a position to have responsibility for TNC's health insurance program. X's spouse has expertise in managing health insurance programs. Unless there are some very unusual circumstances, X would be discouraged from hiring his or her spouse because of the potential conflict of interest. For example: if X hired his or her spouse, X would be in the position of making salary decisions which would directly, or at least indirectly, have a financial impact upon X.

EXAMPLE: XYZ Corporation is selling property to The Nature Conservancy for fair market value. The Conservancy's Board member, Jones, is also a member of the board of XYZ Corporation. Jones appraises the property for XYZ Corporation. Even if Jones waives all appraisal fees, a conflict exists both because Jones is a director of both corporations and both corporations have an interest in the transaction, and because Jones rendered consulting services. Jones should recuse himself, on the record, from any involvement in this project.

[Note: If Jones own more than 5% of XYZ, the Conservancy's policy regarding Conservation Sales to or From Related Parties would prohibit TNC from purchasing of land from XYZ Corporation.]

EXAMPLE: X is on the Board of The Nature Conservancy and is also the chairman of the Board of the Y Corporation. The Y Corporation owns land which is of great ecological interest to the Conservancy. Through the intervention of X, Y Corporation is willing to sell this property to the Conservancy at a substantial discount, the discount being confirmed by the Conservancy's independent appraisals. Because of X's relationship with both Y Corporation and the Conservancy, X has a conflict. However, provided that X does not own more that 5% of the equity of the Y corporation, provided that there is full disclosure of the situation to both Y Corporation and the Conservancy, and provided that X recuses himself from any involvement in the decision concerning this property, there is no reason why the Conservancy could not proceed with the transaction. The Conflict of Interest policy is not intended in any way to discourage covered persons from helping the Conservancy acquire property through gifts or partial gifts.

Responsible Function/Party:

Worldwide Office Legal Function.

North Carolina Coastal Land Trust Conflict of Interest Policy

Definition of Conflict of Interest

A potential conflict of interest exists when a *staff or board member, or a related party*, which, for purposes of this section, has the same meaning as in either section 367(b) or section 707(b) of the Internal Revenue Code,

(a) has a financial interest in a matter that is adverse to the interest of the Land Trust;

(b) utilizes proprietary information learned in the course of Land Trust business for his or her own personal or business interests;

(c) represents, or is aligned or associated with another person or persons who are involved in a transaction with the Land Trust where a *staff or board member* is unable to exercise independent judgment in the consideration of a Land Trust matter or where the *staff or board member's* participation in a transaction may give the appearance of impropriety.

A potential conflict of interest also exists when a *staff or board member* engages in activities that may cause a loss of public credibility for the Land Trust or create a public impression of impropriety.

Specific Examples

Without limiting the above, the following constitute a potential conflict of interest:

(1) The Land Trust contracts for products or services with a board member, a staff member or a related party;

(2) The Land Trust acquires an interest in land from a board member, staff member or a related party or sells an interest in land to a board member, staff member or related party;

(3) A board member, staff member or related party uses knowledge or a relationship gained through Land Trust for his or her own personal or business interest, (as where a board or staff member seeks to negotiate a "side deal" for acquisition of land from someone with whom the Land Trust is currently negotiating);

(4) A board member, staff member or related party seeks special concessions from the Land Trust with respect to a particular transaction.

General Procedures for Resolving Conflicts

In the event of a potential conflict of interest:

(1) The board member or staff member shall disclose the potential conflict to the Land Trust (his/her supervisor, or the Board Chair, respectively);

(2) The board member or staff member must abstain from voting or participating in any decision making process with respect to the transaction or matter giving rise to the potential conflict;

(3) If appropriate, the potential conflict may be referred to the Executive Committee of the Board, which shall have the authority to determine whether a conflict exists and to set conditions for resolution of any conflict. The Executive Committee shall consider the potential conflict, conduct such inquiry and investigation as it deems appropriate and shall approve a transaction involving a potential conflict only after finding that the transaction is fair, equitable and has no material adverse effect on the Land Trust;

(4) The disclosure and resolution of the potential conflict shall be documented in writing.

Specific Requirements for Resolving Conflicts Involving the Acquisition, Sale or Donation of an Interest in Land

The Land Trust shall only sell, acquire or receive a donation of an interest in land to or from a board member, staff member or related party if the following requirements are met:

(1) The Executive Committee of the Land Trust determines that the sale, acquisition or donation would be appropriate even if the board or staff member were not involved.

(2) In the case of a purchase by the Land Trust, the value of the interest in land is verified by independent appraisal.

(3) In the case of a sale by the Land Trust, the interest in land has been marketed publicly to other buyers and the Land Trust determines that the offer from the board member, staff member, etc., is the best available.

Vermont Land Trust — Personnel Policy Addendum: Conflict of Interest Policy

Members of the Board of Trustees, Officers and employees of the Vermont Land Trust (VLT) owe a duty of undivided and unqualified loyalty to VLT. They are not permitted to use their positions to profit personally at the expense of VLT or to benefit the professional or financial interests of any other corporation which they may serve as Trustee, Officer or employee. The duty of loyalty prohibits Trustees, Officers and employees from usurping for the advantage of themselves or others an opportunity that rightfully belongs to VLT and from entering into unfair transactions or contracts with VLT. In addition, a Trustee, Officer or employee of VLT must perform his or her duties in good faith and in a manner he or she reasonably believes to be in the best interest of VLT. This policy is intended to express general guidelines which are to be observed by Trustees, Officers and employees of VLT.

Disclosure. The policy of the Board of Trustees of VLT requires that in the event the Board of Trustees, an Officer or an employee must consider any transaction for VLT which involves 1) a Trustee, an Officer or an employee of VLT or a member of his or her family (which shall be spouse, parent, siblings, children and any other relative residing within the household of the member of the Trustee, Officer or employee) or 2) an organization with which a Trustee, Officer or employee of VLT is affiliated, such Trustee, Officer or employee, at his or her first knowledge of the transaction by VLT, shall disclose fully in writing to the Chairman of the Board of Trustees or the President of VLT the precise nature of the interest or involvement.

Disclosure is further required of Trustees, Officers and employees of VLT concerning all relationships and business affiliations that reasonably could give rise to a conflict of interest involving VLT. This disclosure shall be continuously reported and kept current as set forth below.

All disclosures required under this policy must be directed in writing to the Chairman of the Board of Trustees or the President of VLT who, together with the Executive Committee, shall be responsible for the administration of this policy.

Restraint on Participation. Trustees, Officers or employees of VLT who have declared, or been found to have, a conflict of interest in any matter involving the Trust's work shall refrain from participating in consideration of the proposed transaction, unless for special reasons the Board

of Trustees or an Officer requests information or interpretation from the person or persons involved. The person or persons involved should not vote, or otherwise participate in the decision making process on such matters and should not be present at the time of deliberation or voting.

Any Trustee, Officer or employee of VLT who is uncertain about a possible conflict of interest in any matter may request the Board of Trustees or the President to determine whether a possible conflict exists and, in the case of a Trustee, the Board of Trustees shall resolve the question by vote of a majority of the members present and voting, excluding from such number the Trustee who is the subject of the vote. When possible, the question of potential conflict should be referred to counsel for an opinion prior to the Board's vote, but failure to obtain such an opinion will not affect the validity of the vote.

Examples. To help illustrate this policy, the following are examples of conflicts of interest.

(1) The daughter of X (trustee, officer, employee of VLT) is searching for property on which to build a new home. X knows that the Smiths have contacted VLT confidentially about donating a conservation easement next year. X tells his daughter about the Smiths' plans and she then arranges the purchase of property adjacent to the Smiths.

(2) X has been asked to make a number of year-end visits to major VLT supporters. During the course of one such visit Mrs. Smith writes a generous check to VLT. X, also a member of Acme Charity's Board, has also been requested to help plan a fund raising campaign for Acme. X states during an Acme campaign planning meeting that Mrs. Smith (otherwise unknown to Acme) is a good prospect.

(3) The Heifer Farm is on the market and VLT has conducted preliminary discussions with the farm's owner, the Heifer Farm Real Estate Investment Partnership. VLT has identified a young farm family interested in purchasing the Heifer Farm subject to conservation restrictions. The Board of Trustees conduct a deliberation about whether or not to acquire and resell the Heifer Farm, including the top offer VLT should make. X sits silently through these discussions, abstains from voting, but does not disclose that his brother is a limited partner in the Heifer Farm.

Conflict of Interest Disclosure Statement

I have received and read the "Policy on Conflicts of Interest" approved by the Board of Trustees on June 24, 1991, and I agree to conduct myself in accordance with the policy, including making the necessary disclosures when such situations arise.

For the information of the Vermont Land Trust, I am also listing below any "associates" (as defined below) that reasonably could give rise to a conflict of interest involving the Vermont Land Trust, and the position and/or interest which I or a member of my family has in each "associate."

Signed _____ Date _____

Associates*

Director or family member Associate Position and/or Interest

* An associate of an individual includes a person, trust, organization, or enterprise (of a business nature or otherwise) with respect to which the individual or any member of his or her family: 1) is a director, officer, employee, member, partner, or trustee, or 2) has a financial interest that reasonably could give rise to a conflict of interest involving the institution, or any other interest which enables him or her to exercise control or significantly influence policy.

Check Your Progress

Before continuing on to the next chapter, check that you:

- ☐ Understand why it is essential to avoid or manage real or perceived conflicts of interest;
- ☐ Know how to advance a discussion of conflicts of interest (both real and perceived) in your land trust;
- ☐ Understand the societal and legal reasons for avoiding conflicts of interest (federal law specifics and state law generally);
- ☐ Understand a board member's basic legal duties and fiduciary responsibilities (duty of good faith, duty of care and duty of loyalty);
- ☐ Understand when a conflict of interest can be managed and when a conflict dictates the abandonment of a transaction or initiative or the severing of a relationship;
- ☐ Be able to explain the importance of a conflict of interest policy;
- ☐ Gain experience drafting a conflict of interest policy that specifically addresses:
  - ☐ Who is a potentially conflicted party;
  - ☐ How potential conflicts should be disclosed;
  - ☐ How to manage potential conflicts by specifying responsibilities of the potentially conflicted party and the organization; and
- ☐ How to document actions taken in managing a potential conflict of interest; and
- ☐ Develop strategies for implementing the conflict of interest policy in your land trust.

Notes

Chapter Three · Transactions with Insiders

Practice 4C: Transactions with Insiders

When engaging in land and easement transactions with insiders, the land trust: follows its conflict of interest policy; documents that the project meets the land trust's mission; follows all transaction policies and procedures; and ensures that there is no private inurement or impermissible private benefit. For purchases and sales of property to insiders, the land trust obtains a qualified independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real-estate experience. When selling property to insiders, the land trust widely markets the property in a manner sufficient to ensure that the property is sold at or above fair market value and to avoid the reality or perception that the sale inappropriately benefited an insider.

Learning Objectives

After studying this chapter you should:

- Understand why transactions with insiders are subject to a high degree of scrutiny by the public and under the law;
- Appreciate the serious financial penalties and other claims that may be imposed on insiders, land trust managers and their land trust as a result of participation in an insider transaction determined to be impermissible under federal and/or state law;
- Know how to advance a discussion of transactions with insiders in your land trust;
- Explore when a transaction with an insider may occur;
- Become familiar with the terms *private inurement, private benefit* and *excess benefit transaction*;
- Understand how to manage transactions with insiders, including:
    - Following the conflict of interest policy;
    - Documenting that the project advances or is consistent with the land trust's mission;
    - Following all transaction policies and procedures;

- Ensuring that there is no private inurement or impermissible private benefit;
- Obtaining a qualified independent appraisal for purchases from, and sales of property to, insiders;
- Marketing a property widely to meet the specific requirement of the practice; and
- Documenting the decisions taken and procedures followed in a transaction involving an insider; and
- Understand how other land trusts have managed transactions with insiders, and, especially, how land trusts market properties for sale.

Qualified Independent Appraisal: An independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real-estate experience.

Fair Market Value: The price for which property or the right to use property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell or transfer property or the right to use property, and both having reasonable knowledge of all the relevant facts.

Summary

Conflicts of interests surface most commonly in real-estate transactions involving board members, employees and other insiders. These transactions include the following: land purchases and sales, conservation easement donations, conservation easement amendments, and conservation easement enforcement. While some land trusts avoid selling to or buying from board and staff members, or entering into conservation easement amendments with current board or staff members, others want to be able to engage these parties in transactions related to their mission. In addition, should a potential conservation easement violation arise on property owned by a current board member, your land trust must address the problem promptly, while the member is on the board, to resolve the situation without delay and avoid negative publicity. This chapter will help land trusts avoid real and perceived conflicts of interest with regard to transactions with insiders.

This chapter begins with a self-assessment exercise that reviews what you learned in chapter two about conflicts of interest and how to address conflicts through the development, adoption and implementation of a conflict of interest policy.

Chapter three builds upon this foundation to address, in more depth, the ethical and legal issues that arise in real-estate transactions involving board members, employees and other insiders. After a discussion of the special procedures required by law to avoid excess financial benefit to insiders, and a case study involving past Nature Conservancy practices questioned in *The Washington Post* articles in 2003, this chapter provides a hands-on exercise for implementing your conflict of interest policy to manage a transaction involving an insider. The chapter then concludes with a "Putting It into Practice" exercise that gives you more practice in implementing your policy in real-estate transactions involving board members.

The consideration of conflicts of interest is just one of the basic steps that all land trusts must follow in deciding whether to take on a real-estate project and how to handle it ethically and legally if they do so. These steps include, in addition to a consideration of any conflicts of interest, following all of the land trust's standard practices on reviewing projects against selection criteria, conducting site inspections and completing acquisition procedures, and ensuring that there is no private inurement or impermissible private benefit.

Insiders: board and staff members, substantial contributors, parties related to the above, those who have an ability to influence decisions of the organization, and those with access to information not available to the general public. The IRS generally considers "insiders" or disqualified persons under IRC Section 4598 to be persons who, at any time during the five-year period ending on the date of the transaction in question, were in a position to exercise substantial influence over the affairs of the organization. Insiders generally include: board members, key staff, substantial contributors (see IRC Section 507(d)(2)), parties related to the above (defined below) and 35 percent controlled entities. While these are strict definitions within the tax code, land trusts are advised to take an even more proactive approach to the potential damage that conflicts of interest may cause an organization and also include in the definition of insiders all staff members and those with access to information not available to the general public (such as certain volunteers). Related parties is defined by the IRS to include spouse, brothers and sisters, spouses of brothers and sisters, ancestors, children, grandchildren, great-grandchildren, and spouses of children, grandchildren and great-grandchildren.

Who Are Insiders to Your Land Trust and Has Your Land Trust Engaged in Transactions with Them?

Self-Assessment Exercise

Conduct a quick assessment of your understanding of who are considered insiders to your land trust and the nature of any transactions your land trust has engaged in with them. Review chapter two and the pages that follow if you are uncertain of your response.

- Who are, or could be, insiders to your land trust?
- Why are insiders subject to a high degree of scrutiny under the law?
- What are examples of insider transactions your land trust has faced in the previous year or previous five years?
- How have you avoided or managed these insider transactions?
- What have you learned from these situations?
- Will your land trust managers, and the land trust itself, be exposed to financial penalties and other claims as a result of participation in an insider transaction determined to be impermissible under federal and/or state law?
- How would these activities hold up in the "court of public opinion"?

Transactions with Insiders Require Special Procedures

As was discussed in the previous chapter, insiders are those persons who have an ability to influence decisions of the organization and/or who have access to information not available to the general public. Insiders include board and staff members, substantial contributors, other types of individuals that might be unique to your organization (such as volunteers), and parties related to the above.

As noted in Independent Sector's report *Intermediate Sanctions* (October 2002), "Guarding against misuse of charitable assets by officers, directors, and other 'insiders' has long been regarded as fundamental to maintaining public confidence in the charitable sector." As a result, Internal Revenue Code (IRC) Section 501(c)(3) has prohibited transactions that confer excess financial benefit upon insiders, such as excessive compensation or disposition or rental of property at less than fair market value.

Until 1996, the only sanction available to the Internal Revenue Service to enforce this ban on "excess benefit" was revocation of the 501(c)(3) charity's tax exemption — effectively putting the charity out of business. To address this shortcoming, Congress enacted the so-called "intermediate sanctions" rule to allow the IRS to penalize those individuals who misuse their position in a public charity for private gain. For each excess benefit transaction, the law imposes penalty excise taxes both on a class of insiders ("disqualified persons") receiving the excess financial benefit and on another class of insiders ("organization managers") who approved it. The initial penalty is 25 percent of the excess benefit, and is imposed on the disqualified person, not the organization. However, penalties of 10 percent of the excess benefit (to a maximum of $10,000 per transaction) may also be imposed on one or more of the organization's managers if they knowingly participate in the excess benefit transaction. Additional second-tier taxes of 200 percent of the excess benefit apply if the violation is not "corrected" within the taxable period. "Correction" essentially means undoing the excess benefit to the extent possible and taking any measures necessary to make the organization whole.

Intermediate Sanctions allow the IRS to penalize those individuals who misuse their position in a public charity for private gain.

***Correction*:** undoing the excess benefit to the extent possible and taking any measures necessary to make the organization whole.

Disqualified Person: any person who, at any time during the five-year period preceding the excess benefit transaction, was "in a position to exercise substantial influence over the affairs of the organization."

Organization manager: any officer, director or trustee of the organization, or any person with similar powers or responsibilities, including, potentially, an executive director.

A "disqualified person" under the Intermediate Sanctions rules is any person who, at any time during the five-year period preceding the excess benefit transaction, was "in a position to exercise substantial influence over the affairs of the organization." A disqualified person is also (a) any person who is a family member of a disqualified person or (b) any entity in which 35 percent of the control of the beneficial interest is held by such a disqualified person. Specified persons who are deemed to have "substantial influence over the affairs of the organization" include: (1) board members; (2) staff members in the position of president, chief executive officer or chief operating officer; and (3) staff members in the position of treasurer or chief financial officer. With respect to others, the question of whether a person is a disqualified person is determined by a review of all relevant facts and circumstances bearing on the person's level of influence over the organization with respect to a transaction.

An "organization manager" is any officer, director or trustee of the organization, or any person with similar powers or responsibilities, including, potentially, an executive director.

These penalties on excess benefit transactions are "intermediate" in the sense that the IRS can still revoke the tax exemption of the 501(c)(3) public charity that engages in prohibited excess benefit transactions when the IRS determines such revocation is warranted. Generally, the IRS considers four factors in such a determination: (1) involvement in repeated excess benefit transactions; (2) the size and scope of the excess

benefit transactions; (3) the nature of any safeguards implemented by the organization to guard against future excess benefit transactions; and (4) the organization's compliance with other applicable laws.

In June 2004, the Internal Revenue Service issued IRS Notice 2004-41, which notified donors of conservation easements and purchasers of conservation properties that the IRS would disallow improper deductions. In the notice, the IRS indicated its intent to impose penalties on donors and organizations that knowingly participate in an excess benefit transaction, as well as on the promoters and appraisers involved in the improper deductions. As of March 2006, the IRS reports that it has examined more than 25 promoters and has referred nine for further investigation. It is also investigating more than 15 recipient charities for involvement in particular abuses, and several charity officials for unduly profiting from their positions with the organization.

Keep in mind that the prohibition is against "excess benefit" is not intended to prohibit all transactions between a land trust and an insider. In order to engage in transactions with an insider, the land trust must test the transaction against a standard of "reasonableness" when compared with the transactions of similar organizations in similar circumstances.

Under the Intermediate Sanctions rules, an organization can establish a rebuttable presumption that a salary, payment or transaction is "reasonable" and does not constitute a prohibited excess benefit transaction, if the organization takes the following three steps in approving it:

1. The transaction must be approved by an "authorized body" of the organization. The authorized body must be the board or a board committee. This body must be free from any conflict of interest.
2. The authorized body must rely upon "appropriate data" regarding comparability in determining the salary or payment is reasonable. For example, a board determining compensation for a disqualified person may examine compensation levels paid by similarly situated organizations, both tax-exempt and taxable. Or a board purchasing property from a disqualified person may rely on an independent appraisal establishing the market value of the property.
3. The authorized body must adequately document the basis for its determination at the same time the determination is made. At the time the transaction is approved a memorandum or detailed minutes of the meeting explaining the basis for determining that the transaction is reasonable should be prepared.

When these three conditions are met, a penalty excise tax will be imposed by the IRS only if it develops evidence contrary to that presented.

In considering the "reasonableness" of the transaction, the land trust should consider not only whether it is reasonable in a court of law but also whether it is reasonable in the court of public opinion. After you have asked yourself whether or not the details of the deal would appear reasonable to a judge if you were called to testify about it, you should ask yourself whether or not they would also appear reasonable to the reader of a newspaper article about the deal written by an investigative reporter. Just because the transaction would be considered legal does not mean that it is ethical.

Just because the transaction would be considered legal does not mean that it is ethical.

The rest of this chapter will provide your land trust with the tools and procedures for ensuring that transactions with "insiders" are "reasonable" and receive appropriate review within the context of your organization and its conservation mission.

Case Study: Insider Transactions at The Nature Conservancy

We start with a return to *The Washington Post* articles on The Nature Conservancy. One of TNC's practices questioned by *The Washington Post* in 2003 was their "conservation buyer" real-estate transactions.* In these transactions, TNC would purchase property, attach a conservation easement to it, and then resell it at its restricted value to a buyer willing to make a tax-deductible donation approximately equal to or more than the diminution in property value resulting from the conservation easement. While *The Washington Post* alluded to some concerns about conservation buyer transactions' propriety in general, one article specifically focused on such transactions between TNC and insiders.†

The story discussed what its authors perceived were possibly improper transactions involving TNC's purchase of ecologically sensitive land followed by a sale of the property subject to a conservation easement to insiders. The insiders could then build in a location on the property reserved under the conservation easement for residential use. The article included the following examples of TNC's actions:

- Purchasing 10 acres on New York's Shelter Island for $2.1 million, then reselling the property with development restrictions to the former chairman of TNC's regional chapter and his wife, a

* See chapter 2, *Case Study: The Nature Conservancy* (discussing *The Washington Post*'s 2003 series articles criticizing TNC practices).
† Ibid.

trustee at TNC's preserve, for $500,000. The sale was accompanied by a $1.6 million charitable donation from the private buyer to TNC.

- Purchasing a 350-acre Kentucky River tract for $335,800, then reselling 146 acres of development-restricted property to a TNC New Jersey trustee and his daughter for $252,500. The sale was accompanied by a $113,200 charitable donation from the private buyer to TNC.
- Purchasing 185 acres on Lake Huron in Michigan for $1.7 million, then reselling the property with development restrictions to a former TNC trustee for $1.1 million. The sale was accompanied by a $650,000 charitable donation from the private buyer to TNC.

Among other criticisms, *The Washington Post* questioned whether TNC could have received significantly higher returns by marketing these properties to the general public. Despite TNC stressing that conservation buyer transactions amount to only a small fraction of its overall conservation activities and that its goal in every case is to find a suitable conservation buyer, whether that person is a TNC trustee or not, the perception of self-dealing cast a shadow over the credibility of the organization's operations as a whole.

While selling land to trustees is not improper on its face in most jurisdictions, the potential for self-dealing increases dramatically when land is not independently appraised, widely advertised or sold for market value. Although steps such as these can do much to eliminate any perceived impropriety, TNC has gone further and since adopted an even more stringent policy, prohibiting all purchases or sales of real-estate to insiders. This policy provides as follows:

Sales To or From Related Parties

It is the policy of The Nature Conservancy to prohibit both the purchase of real estate (or any interest therein) from and the sale of real estate (or any interest therein) to any "related party." For this purpose, a related party includes:

a. Any individual who is, or who was at any time during the 12-month period ending on the date of the purchase or sale, a member of the Board of Governors, a Trustee, or an employee of the Conservancy;

b. Any individual who is a close relative of such an individual; or

c. Any entity in which the individual owns and/or his close relatives own directly or indirectly more than five percent of the equity interest therein.

Questions

- Has your organization ever been in a similar situation? If so, how did you handle it? Would you handle it the same way today?
- If you were on TNC's board, how would you have responded to *The Washington Post* article?
- Is prohibiting all purchases or sales of real estate to insiders an appropriate response for your land trust? If not, what policy would you employ to address such insider transactions?

The following exercise walks you through the steps of implementing your conflict of interest policy to manage a transaction involving an insider, making use of a proposed "conservation buyer" transaction that has elements similar to those examples provided above. The exercise illustrates the challenges faced by a land trust in completing a real estate transaction involving a board member or other insider, with the added complexity of the "conservation buyer" overlay.

The exercise is followed by a discussion of how other land trusts have approached transactions with current (and former) board members, and an examination of several scenarios involving transactions with board members.

Implementing Your Conflict of Interest Policy to Manage a Transaction Involving an Insider

This exercise is designed for use in instructor-led training, self-study and in-house land trust training and discussion. If used for self-study, we suggest that you review the hypothetical scenario and think through your answers to the questions included in the following materials. If used for in-house land trust training, we suggest that you have a facilitator (such as a board member, staff member or outside consultant) review the hypothetical scenario with the participants and then lead a discussion of the steps the land trust should employ in working through the real-estate transaction involving an insider. Guidance on possible answers to the questions concerning conflicts of interest and on tailoring the template conflict of interest policy are interspersed throughout the exercise.

Consider the following hypothetical scenario involving an insider transaction similar to those mentioned in The Nature Conservancy case study. Assume that Jane, longtime board member of your land trust, has approached the board about purchasing 100 acres that include ecologically sensitive wetlands. Jane learned of the landowner's likely intent to list the property for sale and has convinced the landowner to wait to list the property until she has talked about it with the land trust. She has added that, should the land trust be interested in pursuing the project but concerned about whether it has sufficient funds to do so, she would be willing to purchase the property through a back-to-back transaction where: (1) the land trust acquires the property at its fair market value based upon a qualified independent appraisal; (2) the land trust immediately thereafter sells the property to Jane subject to a conservation easement that allows for construction of a single-family residence within a non-ecologically sensitive upland portion of the property, with the purchase price set at the fair market value of the property as restricted by the conservation easement (based again on a qualified independent appraisal); and (3) Jane agrees to enter into a pledge agreement with the land trust to donate funds to the land trust over a 10-year period equal to the difference between the fair market value of the property before imposition of the conservation easement and the fair market value of the property after imposition of the conservation easement.

Consider the land acquisition policies of your land trust and then describe the steps you would take to appropriately manage the transaction

under those land acquisition policies and under a written conflict of interest policy requiring: (1) disclosure of real or perceived conflicts; (2) recusal of conflicted parties from discussion and voting; (3) fairness to the land trust in all transactions; and (4) written documentation of all actions taken to manage a conflict of interest. After you have done so, review the Recommended Steps that follow. Have you, at a minimum, followed these steps? If not, why not? Have you added any additional steps or requirements, such as asking Jane to step down from the board during the course of the transaction? If so, why have you added these additional steps or requirements?

Recommended Steps

1. **Disclosure of the Conflict**: The first step in properly managing this insider transaction is full disclosure by the conflicted insider, Jane. Here, the critical disclosure is that Jane has brought the property to the board's attention, not only because of its perceived ecological importance but also because of a potential interest she has in owning it. Having a conflict of interest policy in place, preferably one that is signed by each board member on an annual basis, is key in making sure that any potential conflicts of interest are disclosed at the earliest possible date.
2. **Recusal from Discussion and Vote**: After bringing the matter before the board, Jane should answer any board questions regarding her potential conflict of interest and any specific personal knowledge regarding the property. Jane should then recuse herself from, and not be present during, further discussions involving the project. Once Jane has recused herself and left the room, the remaining board members should determine whether a conflict of interest exists and, if it does, how to proceed.

Here, the board should determine that a conflict of interest does exist. The board should then decide how to proceed given this conflict. At this point, the board should go through the same kind of analysis that it would give to selecting and pursuing any other potentially worthy acquisition project, including:

- Is the project consistent with the land trust's project selection criteria?

- Is this property a priority for the land trust and/or does it fit within its focus area(s)?
- Would completion of the project provide a public benefit consistent with the mission of the land trust?
- What is the best conservation tool for acquiring the appropriate interest in the property and maintaining the property's conservation values? Fee acquisition? Acquisition of a conservation easement?
- What capabilities does the land trust have for performing any perpetual stewardship responsibilities on the property, including easement monitoring and enforcement?
- What options does the land trust have for financing acquisition of the appropriate interest in the property?

These appropriate practices for evaluating and selecting conservation projects and ensuring sound transactions are described in more detail in Standards 8 and 9 of *Land Trust Standards and Practices* and in the Land Trust Alliance's course "Successful Planning, Selection and Evaluation of Conservation Projects."

Of special relevance to the last question is Jane's proposal to enter into a pledge agreement with the land trust to donate funds to the land trust over a 10-year period equal to the difference between the fair market value of the property before imposition of the conservation easement and the fair market value of the property after imposition of the conservation easement. Obviously the land trust would love to receive such a donation, to make them "whole," but the land trust could not require such a pledge as part of the purchase agreement from Jane or any other purchaser of the restricted land. In addition, the land trust could give little assurance to Jane or any other purchaser of the restricted land that the IRS might not question the charitable nature of such a pledge.

It is possible that the board may conclude that it simply does not have the financial resources for financing acquisition of the appropriate interest in the property and cannot accept Jane's generous proposal because of her position on the board and the board's uncertainty about the charitable nature of the pledge agreement. In such case, the board can go back to Jane and let her know that the land trust is unable to enter into the transaction and she is free to pursue acquisition of the property herself.

On the other hand, assuming that protection of the property falls within the land trust's criteria for evaluating and selecting projects, and holding of a conservation easement is an appropriate tool for maintaining the property's conservation values, then by vote of the remaining board members, the land trust could decide to go forward with the purchase of the property, subject to the additional considerations below.

3. **Fairness to the Land Trust**: Under the land trust's conflict of interest policy, all insider transactions require a finding of fairness to the land trust. Thus, while the board decides to purchase the wetland property, Jane has recused herself from all participation in the matter, and the land trust has made no promises regarding the final disposition of the protected property. Instead, the land trust has the property independently appraised (before and after imposition of a conservation easement with appropriate restrictions), and determines the most prudent procedure for successfully completing the project in a manner that leaves it with the conservation easement and sufficient stewardship funds to protect its rights under the easement. The board decides, in order to best control the transaction and to minimize its cash outlay for the property, (a) to enter into a purchase agreement with the seller that contains a financing contingency sufficient to give the land trust time to find a suitable conservation buyer; (b) to market the restricted fee widely during this contingency period among a group of potential conservation buyers (which includes Jane), through advertising, through word of mouth and possibly through the use of a broker or other means; and (c) to select the conservation buyer based upon the proposal received from the conservation buyer that best allows the land trust to accomplish its acquisition and stewardship objectives (the proposal may or may not be from Jane). As part of its financing contingency, and apart from widely marketing the restricted fee to potential conservation buyers, the land trust should also broadly solicit pledges of donations to cover the land trust's costs in restricting the property and stewarding the easement. These donations would not be expected to come from the conservation buyer but from the public-at-large (which might include Jane or other conservation buyers).

4. **Documenting the Board's Actions**: Throughout the management of this conflict, the board documents its actions in the minutes recorded at board meetings. Should Jane be selected as the buyer, the board prepares a formal memorandum documenting the public benefit provided by the transaction and how its actions were consistent with its acquisition policies and procedures. The memorandum should also detail (a) why Jane's payment for the restricted fee was "reasonable" (based upon a qualified independent appraisal commissioned by the land trust); (b) why the selection of Jane as the conservation buyer was "reasonable" (based upon a proposal that best allowed the land trust to accomplish its acquisition and stewardship objectives, after having widely solicited proposals from a group of potential conservation buyers); and, therefore, (c) why the board concluded that the sale of the restricted fee to Jane did not constitute a prohibited excess benefit transaction.

Questions

- Do you feel the board handled this transaction appropriately? Why or why not?
- How do you think the situation made Jane feel? After she first came to the board with her proposal? After the board told her that it could not go forward with the transaction in spite of her generous offer? After the board told her that the land trust would work with the landowner directly and then solicit proposals from the general public to purchase the restricted fee and pledges of donations to the land trust to cover the land trust's costs in restricting the property?
- Can you think of other ways the land trust could have achieved the objective of widely marketing the property?
- Do you feel that the land trust would have benefited from having a policy in place that specifically addressed transactions with board (and former board) members before the opportunity to purchase and protect the wetland property was presented by Jane?

The following discussion provides you with different approaches to transactions with board (and former board) members that have been employed by other land trust organizations around the country.

Notes

How Land Trusts Approach Transactions with Current (and Former) Board Members

Different organizations approach potential land and easement transactions with board members differently. As discussed in the case study, The Nature Conservancy has chosen to adopt a stringent policy involving sales to or from related parties that prohibits all purchases or sales of real estate to specified insiders (including current and immediate past trustees). Similarly, the Society for the Protection of New Hampshire Forests has a policy that prohibits the organization as a general practice from entering into sale transactions with current board members (SPNHF trustees). Consistent with state law, SPNHF's policy reads as follows:

> The Board will assure that SPNHF shall (a) not loan money or property to any officer or trustee and (b) not sell, lease for a term of greater than five (5) years, purchase, or convey any real estate or interest in real estate to or from an officer or trustee without the prior approval of the probate court, except that this prohibition shall not apply to a bona fide gift of real estate or an interest therein to SPNHF by an officer or trustee.

The SPNHF policy also has more stringent requirements for donations of land or easements by current trustees. Should a current trustee want to donate land or an easement to the organization, SPNHF's conflict of interest policy stipulates that the trustee cannot participate in any discussion of the project and cannot be present when it is voted upon. In addition, the policy requires a two-thirds vote of the board of trustees to approve the transaction, and the board must document that the project is "fair and benefits SPNHF and its objectives."

Other land trusts have not gone as far in addressing purchases or sales of real estate to specified insiders (including current and immediate past board members). The Vermont Land Trust (VLT), for example, has a policy that allows the organization to enter into transactions with current board members, but only after following a carefully prescribed procedure. The procedure includes the preparation of a disclosure statement that describes:

- The nature of the transaction;
- It's public conservation benefit and whether the parcel meets VLT's selection criteria;

- If a conservation easement, if there is any significant variation in the easement's terms from VLT's base documents;
- Any significant variation in the income or expense budget of the project, especially of those expenses typically underwritten by the landowner; and
- If a purchase, substantiation that VLT is not paying more than fair market value for the property interest.

Although it may not be realistic for your land trust to prohibit sales to or purchases from board members outright, your land trust should specifically address real-estate transactions involving board members in its conflict of interest policy or in carefully prescribed procedures that apply the policy to board members. Thinking through in advance how your organization intends to address real-estate transactions involving board members, including sales of property to board members, purchases of property from board members, donations of property from board members, and conservation easement amendments granted to board members, will save your organization — and your board members — much confusion, misunderstanding and conflict when such transactions inevitably arise.

Your land trust should specifically address real-estate transactions involving board members in its conflict of interest policy or in carefully prescribed procedures that apply the policy to board members.

Exploring Transactions with Board Members

This exercise is designed for use in instructor-led training, self-study and in-house land trust training and discussion.

Consider how your land trust's board might handle the following hypothetical insider transaction scenarios involving board members. Scenario 2 is taken from the Vermont Land Trust's conflict of interest policy. Guidance in handling the hypothetical conflict of interest scenarios is presented on pages 147.

Scenario 1: Board member A is planning to sell his country estate on the open market. A does not bring the sale to the land trust's attention. Another board member learns of the sale independently and thinks the land trust should consider buying and protecting the property, which is high-quality habitat for an imperiled species of woodpecker that the organization has targeted for conservation action.

Scenario 2: The Heifer Farm is on the market and the land trust has conducted preliminary discussions with the farm's owner, the Heifer Farm Real Estate Investment Partnership. The land trust has identified a young farm family interested in purchasing the Heifer Farm subject to conservation restrictions. The land trust board deliberates about whether or not to acquire and resell the Heifer Farm, including the top offer the land trust should make. Board member B sits silently through these discussions and abstains from voting, but does not disclose that his brother is a limited partner in the Heifer Farm.

Scenario 3: Board member C owns a large plat of farmland over which the land trust holds an easement restricting development to "farm accessory structures." Board member C approaches the board seeking an amendment to the easement such that a farmhouse could be built on the property.

Scenario 4: Instead of seeking an easement amendment, as in scenario 3, board member C says nothing and begins construction of a farmhouse on the farmland. When another member of the board questions C's development, C states that because all farms have farmhouses on them, the house qualifies as a "farm accessory" under the easement.

Guidance

Scenario 1

The land trust would need to consider whether its conflict of interest policy allows it to enter into a transaction involving a current board member. Assuming it does, the land trust should inform board member A that it is potentially interested in acquiring conservation protections on his property at or below fair market value, either through the purchase of a conservation easement or through fee simple purchase of the entire estate. The land trust should then ask board member A not to list the property until the board has had the chance to meet and discuss the project under its conflict of interest procedures. If board member A is agreeable, and the land trust board (without board member A's participation) approves proceeding with the transaction, the land trust should commission a qualified independent appraisal to determine the purchase price for the property or conservation easement. If board member A does not agree to a delay in listing the property and the land trust board (without board member A's participation) still approves proceeding with the transaction, the land trust should either (if there is sufficient time to do so) commission a qualified independent appraisal to determine the purchase price of its offer on the property or (if there is not sufficient time to commission such an appraisal) make an offer — using the best available information of current market value — that is subject to a contingency in the purchase agreement that the purchase price be substantiated by a qualified independent appraisal of the fair market value of the property.

Scenario 2

Board member B is in violation of the land trust's conflict of interest policy because of his failure to disclose that his brother is a limited partner in the Heifer Farm. As a result, it may no longer be possible for the land trust to proceed with the acquisition of the Heifer Farm. In addition, the land trust should follow the procedures under its conflict of interest policy for when a violation of the policy has occurred, which may include requiring that B resign from the board.

Scenario 3

The land trust would first need to consider whether a farmhouse could be interpreted under the easement as being a "farm accessory structure." Given the conflict of interest, board member C must not be

present at or participate in such discussions. Assuming a farmhouse is not a "farm accessory structure," an amendment would be required to allow the farmhouse to be built on board member C's property. Amending an easement on a board member's property presents an additional conflict of interest, and board member C must not participate in these deliberations. In considering the amendment request, the board would need to pay close attention to the issues of private inurement and excess benefit. A land trust, like any other 501(c)(3) tax-exempt organization, must not confer inappropriate benefits to board members, staff or other insiders. Extra care must be taken when dealing with the board member's proposed amendment to ensure that there is no net loss of conservation values and no increase in the financial value of the land. A preferable approach, whether or not a board member is involved, would be to take steps to enhance the protection of the property and its conservation values as part of any amendment to the easement. Any amendment request should be approached with caution and follow the land trust's amendment policy. (For more on easement amendments, see Practice 11I: The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.)

Scenario 4

Ideally, the land trust's conflict of interest policy will address this situation by requiring that a board member resign from the board if the board determines, at its sole discretion and without the board member being present or participating in the discussion, that the land trust has reason to believe that a board member has violated the terms of an easement. If the land trust has such a stipulation in its conflict of interest policy, then it should proceed accordingly and treat the potential easement violation of the former board member in the same manner as it would any other potential easement violation. If the land trust does not have such a requirement, then it should still follow its conflict of interest policy, and the board should discuss the situation and possible resolutions without board member C being present or participating in

the deliberations. The land trust should consider asking board member C to resign when it formally notifies him or her of the easement violation. If the board member refuses to step down, the land trust should require the board member to do so if its bylaws allow. In any case, the land trust should treat the potential easement violation no differently from how it would treat a potential violation from a landowner who is not a current (or former) board member.

Additional Resources

Nonprofit and Land Trust Alliance Resources

The following resources may be helpful to you in understanding what you and your land trust need to know about "excess benefit transactions," and about "intermediate sanctions" that apply to organization managers who engage in these transactions.

Independent Sector (http://independentsector.org/): One resource from Independent Sector that can help land trusts better understand the IRS Intermediate Sanctions Rules is *Intermediate Sanctions: What You Need to Know About the Proposed IRS Regulations* (published in 2002). It can be ordered through their website.

Land Trust Alliance (http://lta.org/) *Exchange* articles (reprinted here on pages 150–159)

"Law Update: New Penalties Imposed on Private Inurement Transactions," Winter 1997 (Vol. 16 No. 1)

"Law Update: Staying Within the Bounds of the Income Tax Code and Public Perception: Private Inurement and Private Benefit," Spring 1999 (Vol. 18 No. 2)

"Law Update: Staying Within the Bounds of the Income Tax Code and Public Perception: Conflict of Interest and Excess Benefit," Summer 1999 (Vol. 18 No. 3)

Sample Land Trust Policies

The following sample land trust policies may be helpful to you in tailoring your conflict of interest policy to address real-estate transactions involving board members or other insiders. Review them to see how the situations they cover may be similar to the situations your land trust faces.

Black Warrior–Cahaba Rivers Land Trust

Policy Regarding Avoidance of Conflicts of Interest and Overvaluation When Accepting Land and Easement Donations (see page 159)

The Nature Conservancy

Sales To or From Related Parties (see page 162)

Tax Deductions for Contributions of Land by Members of the Board of Governors (see page 165)

Vermont Land Trust

Transactions with Insiders (see page 166)

Land Trust Alliance Resources

The following articles first appeared in Land trust Alliance's quarterly, *Exchange.*

Law Update: New Penalties Imposed on Private Inurement Transactions

Katherine Barton

Winter 1997 (Vol. 16 No. 1)

New legislation passed last summer, known as the "intermediate sanctions" legislation, imposes substantial penalties on leaders and managers of section 501(c)(3) organizations, including land trusts, that provide "excess benefits" to organization insiders, such as directors, officers, and senior staff. While the legislation was prompted largely by concerns about unreasonably high CEO salary packages, it also applies to the purchase of property for greater than fair market value, or sale for less than fair market value, to organization insiders — a particular concern for land trusts that undertake land transactions with board members, staff, or possibly even major donors. However, the law provides a relatively simple procedure by which organizations can establish a "rebuttable presumption" that a salary or transaction is reasonable, a procedure land trusts will want to consider adopting, at least in certain situations.

The new legislation, passed as part of the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, doesn't change the basic legal requirement: charitable organizations have long been prohibited from providing "private inurement" to board, staff, and members. In the past, however, the only sanction available to the IRS was to revoke the organization's tax exempt status, a penalty that was often unworkable due to its harshness. The intermediate sanctions legislation simply provides alternative financial penalties for certain violations.

Excess Benefit Transactions

The new penalties apply to "excess benefit transactions": any transaction in which a "disqualified person" receives a benefit from an organization

that is greater than the fair market value of the services, payment, or property provided in return. Thus the penalties apply to unreasonable compensation for employment or services, transfers of property that are not at fair market value, and payment for which no goods or services are received, such as payments to cover personal expenses unrelated to the organization's charitable activities.

A "disqualified person" is a person who, at any time during the five years prior to the transaction, was "in a position to exercise substantial influence over the affairs of the organization," plus his or her family members and entities 35 percent controlled by them. This will generally include directors and officers, except for honorary or nonvoting advisory board members, the CEO, and perhaps other executive staff. It is possible that it could even include an organization's major donors. Future regulations should provide more guidance as to who is a disqualified person.

Standards of existing law apply in determining reasonableness and fair market value. Of particular importance is that "reasonable" compensation may be determined by looking at compensation in the for-profit sector. There is no requirement that individuals working for non-profits accept reduced compensation.

Rebuttable Presumption

One of the most important features of the legislation is contained in House report language. It allows an organization to establish a rebuttable presumption that a salary, payment, or transaction is "reasonable" if the organization takes the following three steps in approving it.

1. The transaction must be approved by a board of directors or board committee that was composed of individuals unrelated to and not subject to the control of the disqualified person. This function cannot be delegated to staff or to a non-board committee.
2. The board or committee must rely upon "appropriate data" regarding comparability in determining the amount of compensation. According to the House report, in setting salary packages such data may include data on compensation levels paid by similarly situated organizations, both taxable and tax exempt, for functionally comparable positions; data about employment in the area where the organization is located; independent compensation surveys by nationally recognized independent firms; or actual written offers from similar institutions competing for the services of the disqualified person. Similar comparability data must be used in establishing the presumption for other types of transactions.

3. The board or committee must "adequately document" the basis for its determination by preparing at the time the transaction is approved a memorandum or detailed minutes of the meeting explaining the basis for determining that the transaction is reasonable.

Once a rebuttable presumption is established, penalties may be imposed only if the IRS develops sufficient contrary evidence to rebut the presumption of reasonableness. A former IRS senior official has suggested that the IRS lacks the funds to conduct its own comparability studies and that except in cases of possible malfeasance, the IRS is not likely to challenge transactions based on reasonable data.

Penalties

For each excess benefit transaction, the law imposes penalty excise taxes both on the disqualified person receiving the payment and on the "organization managers" who approved it. The disqualified person is subject to a tax equal to 25 percent of the excess benefit, with much higher penalties if the excess benefit is not corrected, within a certain time period, by returning the organization to a financial position not worse than it would have been in under highest fiduciary standards. Each organization manager who knowingly participated in the transaction is subject to a tax equal to 10 percent of the excess benefit (up to a maximum of $10,000), unless his or her participation was not willful and was due to reasonable cause. An "organization manager" is any officer, director, or trustee, or any person with similar powers or responsibilities including, potentially, an executive director.

Future regulations should clarify some of the uncertainties in the legislation. In the meantime, IRS officials have stated that the IRS will simply look for reasonable, good faith efforts in setting compensation and reviewing transactions. The intermediate sanctions legislation should not generally pose serious problems for land trusts where salaries are unquestionably in the normal or below-normal range, where payments to insiders are clearly not in excess of fair market value, or where an organization carefully reviews the transaction and takes the steps necessary to establish a rebuttable presumption.

Law Update: Staying Within the Bounds of the Income Tax Code and Public Perception: Private Inurement and Private Benefit

Bill Silberstein and Jessica Jay

Spring 1999 (Vol. 18 No. 2)

Working or volunteering for a nonprofit, tax-exempt land trust carries a host of responsibilities. One is to maintain the tax-exempt status of the organization. As a board member, executive director, or staff member, you must be aware of pitfalls that could jeopardize this status.

This article defines and discusses private inurement and private benefit, both of which could place your organization's tax-exempt status at risk under section 501(c)(3) of the Internal Revenue Code. In the next edition of *Exchange* we will discuss two other potential problems — excess benefit and conflict of interest.

Private Inurement

I.R.C. §501(c)(3) instructs that a tax-exempt charitable organization must be organized and operated so that no part of its net earnings "inures to the benefit of any private shareholder or individual." The measure against private inurement ensures that a tax-exempt charitable organization serves a public interest, and not a private interest.

The private inurement doctrine forbids the flow of income or assets from a tax-exempt organization, such as a land trust, to individuals with some significant relationship to the organization, especially when that transaction is unrelated to the organization's tax-exempt purpose, as outlined in its application for tax exempt status under §501(c)(3). The concept of the "insider" who benefits from a transaction for "nonexempt" purposes is intrinsic to private inurement. An "insider" can be an organization's founder, trustee, director, officer, key employee, members of the family of these individuals, and certain entities controlled by them — essentially any person with access to or influence over an organization's funds or assets. The private inurement doctrine does not necessarily prohibit all transactions between a land trust and an insider, but it requires that such transactions be tested against a standard of reasonableness when compared with the transactions of similar organizations in similar circumstances. Because a finding of private inurement could ultimately result in the forfeiture of an organization's status as a 501(c)(3) organization, and therefore its status as a land trust, it is imperative to understand what sorts of transactions may qualify as private inurement.

If you could qualify as an "insider" at your land trust and you begin to feel yourself putting your own interests ahead of the organization's, take this as a warning that you are nearing the realm of private inurement. For instance, if you are a realtor on a land trust board, do not use inside information — such as a potential conservation easement being placed on land next to a property on the market — to encourage potential buyers and thereby increase your business. From another perspective, if you serve on a land trust board with a realtor as a member, keep in mind that the land trust's actions must not create an unreasonable benefit for your fellow board member. For example, the realtor should not be overcompensated for a land transaction in which the land trust and the realtor are both involved. Another example of private inurement might occur if your land trust rents a house on land it owns to a relative of a board or staff member at less than fair market value.

Private Benefit

Unlike private inurement, private benefit is not limited to circumstances where benefits accrue to an organization's "insiders." Instead, private benefit occurs when benefits go to "disinterested persons," or those unrelated to the organization's insider operations. As with private inurement, any benefit that is not a benefit for the public at large is subject to scrutiny, and a finding of private benefit jeopardizes a nonprofit's tax exempt status under I.R.C. §501(c)(3).

Although charitable organizations such as land trusts may provide benefits to private individuals, these benefits must be incidental. Incidental benefits are considered to be those benefits that are insubstantial when measured in the context of the overall public benefit conferred by the activity. Incidental benefits occur as part the nonprofit's public purpose and activity, which cannot be achieved without benefiting some private individuals. For example, the incidental benefits to an adjoining property owner that typically result from a conservation easement both fall within the land trust's mission and are insubstantial in the context of the overall benefit of protecting the property. Such incidental benefits to the adjoining property owner would not be considered a private benefit.

However, if your land trust begins to benefit an individual or a distinct group of individuals in ways that are more than incidental, you are heading towards private benefit. For instance, if you amend a conservation easement to provide more development rights in detriment to the conservation values of the property, you are arguably acting for the sole benefit of the landowner — a "disinterested individual" — without regard for the public interest, and to the detriment of the conservation purpose of your organization. Or, if you hire a fund-raiser to increase

your land trust's endowment, but "compensate" that fund-raiser with an overwhelming amount of the funds raised, you may be granting a private benefit to a disinterested individual and straying from the objective of your tax-exempt organization. (A federal court recently remanded for further findings a private benefit case where a fund-raiser who raised $28.8 million in donations from the public for a nonprofit, tax-exempt organization kept the majority of the funds and only gave $2.3 million to the nonprofit organization). When in doubt, be more cautious than less. Knowing and respecting the boundaries of private inurement and private benefit when dealing in land trust transactions should help you to protect both your land trust's assets, and its tax-exempt status.

In the next issue of *Exchange*, we will discuss conflict of interest and the newly proposed regulations for "excess benefit" dealing with private inurement and private benefit.

Law Update: Staying Within the Bounds of the Income Tax Code and Public Perception: Conflict of Interest and Excess Benefit

Bill Silberstein and Jessica Jay

Summer 1999 (Vol. 18 No. 3)

In the spring edition of *Exchange,* we discussed two issues that affect the charitable, tax-exempt status of a land trust: private inurement and private benefit. In this article we discuss two issues that can affect the public's perception and the tax-exempt status of a non-profit organization: conflict of interest and excess benefits.

Conflict of Interest

The likelihood that a land trust would suffer from the appearance of or actuality of a conflict of interest is probably much greater than the likelihood of running afoul of private inurement, private benefit or excess benefit regulations. It is important to understand conflict of interest and avoid it, since even the appearance of a conflict of interest can result in bad publicity, substantial time devoted to trying to maintain or restore good public relations, and the possibility of liability for board members and staff.

Conflicts of interest may occur in several ways. One example is self dealing, where a director or a staff member stands to benefit financially from involvement with the trust. For example, a board member may propose providing services to the land trust, such as preparing baseline inventory reports for a fee.

A conflict of interest might also arise among directors or staff whose individual business or personal interactions conflict with or oppose the land trust's interests. For example, if a board member wishes to buy land trust property, his or her personal interest would be to buy the property at the lowest possible price, while it would be in the land trust's interest to sell it at the highest possible price. If not properly handled, conflict of interest situations can give rise to liability of board members, and can create public perception problems which could be very damaging to the land trust's credibility.

To ensure that such conflicts of interests do not occur, land trust board members and staff are always bound to place the interest of the land trust ahead of their own private interest. Land trusts should educate their boards and staff about their duty of loyalty and responsibility.

Land trust boards should also be aware of their state laws on conflict of interests. Usually such statutes require directors to disclose information about their conflict of interests and their projected impacts on the land trust transaction. These statutes usually require the entire board or reviewing committee of the land trust to approve the action by a "disinterested majority" — or a majority of those directors without a conflict of interest — who must judge whether the transaction is appropriate and fair, despite its apparent conflict with an individual director. Land trusts should incorporate their state's requirements through the development of conflict of interest policies.

Conflict of interest policies generally should include a requirement of disclosure of any perceived or actual conflicts by directors, officers, and staff members of the land trust, as well as requirements that individuals with perceived or actual conflicts refrain from voting on and/or discussing the conflicted transaction. Policies might also include a requirement that transactions involving financial gain or loss be fair to the land trust and may also include requirements to explain the conflict of interest policy to new directors and staff members, and to enforce the policy.

Land trusts should keep conflict of interest in mind when soliciting new board members. In seeking directors who are active and influential in the community, it may be impossible to find candidates without conflicts. Nevertheless, it is important to be aware of their potential conflicts, and it is wise to steer clear of candidates with extensive conflicts.

Most importantly, land trust board members and staff should remember their basic duty of loyalty that requires them to have an undivided allegiance to the land trust's goals and mission. Keeping this duty of loyalty in mind and disclosing any perceived or actual conflicts of interest

should insulate board members and land trusts from the public perception of, or actuality of, conflicts of interests.

Excess Benefit Transactions

In 1996 Congress added a level of intermediate sanctions structured as penalty excise taxes related to private inurement and private benefit transactions. [For information on private inurement and private benefit, see page 22 of the Spring 1999 *Exchange*.] The Internal Revenue Service may use these sanctions in lieu of, or in addition to, the revocation of an organization's tax-exempt status for violating the rules on private inurement, but are generally intended to address cases in which the excess benefit does not rise to the level of challenging the basic function of an organization's charitable status. This means the IRS has a new tool available to penalize nonprofits for more minor transgressions. The IRS issued proposed regulations on July 30, 1998, to explain and flesh out these rules. It is not known when these proposed regulations will become final. However, it would be advisable to comply with these regulations even now.

An excess benefit transaction may occur between a "disqualified person" and a tax-exempt organization if the disqualified person improperly benefits from a transaction with the organization. ("Disqualified person" is defined as any person who, at any time during the five years prior to the date of the transaction in question, was in a position of influence over the affairs of the organization, or was a close relative of an individual in a position of influence.) Such transactions may take the form of unreasonable compensation from the organization, a non-fair market value transaction between a disqualified person and the organization, or financial arrangement made under which a disqualified person receives compensation based on the organization's income in a transaction that violates the private inurement rules. Tax sanctions may be imposed on the disqualified person and/or the organization managers who participated in the transaction knowing that it was not proper. ("Organization managers" are trustees, directors, and officers of an organization, or individuals with similar powers.)

The proposed regulations refer to a "rebuttable presumption of reasonableness" when considering a non-fair market value transaction or compensation arrangement with a disqualified person. This "presumption of reasonableness" occurs when three conditions are satisfied:

- The arrangement is approved by a board of directors or trustees or a committee of the board comprised of individuals who are not related to, and not subject to the control of, the disqualified persons involved.

- Appropriate comparable data is examined and documented as a basis for the board's determination. For example, a board determining compensation for a disqualified person may examine compensation levels paid by similarly situated organizations, both tax-exempt and taxable.
- The board's determination on compensation is adequately documented, including an evaluation of the individual whose compensation is being established, and the basis for determining that compensation was reasonable in light of both the evaluation and the data. Written or electronic records of the governing body or committee should include the terms of the transaction approved, the date of approval, and the members of the governing body or committee present during the discussion about a transaction or arrangement, any data used by the committee, and a record of those who voted for it. It should also be recorded if a member discloses a conflict of interest and/or recuses himself or herself from the vote and discussions. If the governing body or committee determines that reasonable compensation or fair market value is higher or lower than that determined to be the comparable data, the governing body or committee should record the reason for their determination.

When these three conditions are met, a penalty excise tax will be imposed by the IRS *only* if it develops evidence contrary to that presented.

If the IRS determines that compensation or other transactions are not reasonable, they will be treated as excess benefit transactions. (This includes any form of compensation provided by a tax-exempt organization in exchange for the performance of services, such as forms of cash and non-cash salary, fees, bonuses and severance payments, forms of deferred compensation that are earned and vested, insurance and other benefits, as well as payment or reimbursement by the organization for expenses, fees or taxes.) Financial arrangements under which a disqualified person receives payment based on the organization's income is known as a "revenue sharing" arrangement. A revenue-sharing transaction may be an excess benefit transaction, depending on the facts and circumstances, regardless of whether payments to a disqualified person exceed the fair market compensation values. The IRS may be issuing guidance to tax-exempt organizations by providing examples of revenue-sharing arrangements that violate the private inurement rules in the near future.

Generally, compensation for the performance of services will be reasonable *only* if such amount would ordinarily be paid for like services by like entities under like circumstances existing at the date when the contract

for services is made. Certain economic benefits are not considered for these purposes, including the payment of reasonable expenses for an organization's board members to attend board meetings, economic benefits received by disqualified persons through their membership or volunteer status with the organization, and any economic benefit provided to a disqualified person who is a recipient of a charity's benefits relating to its tax-exempt purposes.

If the IRS determines that an organization manager or a disqualified person engaged in an excess benefit transaction, it may impose an excise tax on these individuals. The excess benefit is determined to be the amount by which a transaction exceeds a fair market value, the amount compensation exceeds reasonable compensation, or the amount of private inurement resulting from the transaction. A disqualified person who is determined to have benefited from an excess benefit transaction must pay an initial excise tax equal to 25 percent the amount of the excess benefit received. A disqualified person has a specific period of time to correct the excess benefit and if he or she fails to do so, may receive an additional excise tax for failure to correct the original excess benefit. An organization manager who is determined to have knowingly participated in an excess benefit transaction must pay an initial excise tax of 10 percent of the excess benefit. The maximum excise tax for an organization manager is $10,000.

While these regulations are not finalized, it is advisable to follow them now because they provide guidance on how to avoid private benefit and private inurement issues in addition to excess benefit.

Sample Land Trust Policies

The Black Warrior–Cahaba Rivers Land Trust — Policy Regarding Avoidance of Conflicts of Interest and Overvaluation When Accepting Land and Easement Donations

I. Purpose

The Black Warrior–Cahaba Rivers Land Trust's (the "Land Trust") effectiveness in protecting water quality and preserving open space is especially dependant upon the organization's credibility in the community. Maintaining this credibility necessarily requires that the Land Trust conducts its business with the highest level of ethical behavior, objectivity,

and fairness. No where is this requirement more important than in the organization's acquisition of conservation lands.

The Land Trust seeks to maximize the efficient use of its financial resources to achieve the greatest conservation benefit possible. Pursuant to this end, the organization actively seeks donations of land and conservation easements from willing landowners. One may reasonably expect that in the course of securing such donations, the Land Trust will be faced with real or apparent conflicts of interest. These transactions will typically involve donations from "insiders," which include board members, staff, substantial contributors, those with access to insider information, those who may influence organizational decisions, and related parties. In addition, the Land Trust may receive offers of donations that are overvalued and potentially not compliant with federal tax law. In order to avoid real or apparent conflicts of interest and to prevent involvement in legally questionable donations, it is appropriate that the Land Trust adopts specific policies and rules regarding donations of land and conservation easements that address such ethically questionable situations.

II. Board of Directors' Obligations

In an effort to identify and avoid real or apparent conflicts of interest, the Land Trust's Board of Directors will do the following:

1. It will objectively evaluate each land or easement donation and determine if the acquisition is consistent with the Land Trust's conservation plan and if the Land Trust would have acquired the property regardless of the ownership or the circumstances of the donation.
2. If any member of the Board of Directors has knowledge of a real or apparent conflict of interest (i.e., a transaction involving an "insider") associated with a prospective land or easement donation, he/she will disclose this knowledge to the rest of the Board.
3. In the event that the Board of Directors identifies a real or apparent conflict of interest directly involving one or more Board members, the identified member(s) will abstain from participating in discussions of and/or voting on any issue related to the transaction.
4. Should the Board of Directors identify a real or perceived conflict of interest associated with the acceptance of a donation deemed to be desirable under the terms of (1) above, it will evaluate the conflict and determine if it can be addressed in a manner consistent with the policies contained in this document. Under no circumstances will the Board of Directors accept a donation if identified conflicts of interest are not addressed and mitigated.

III. Land Acquisition Staff Procedures

In an effort to mitigate potential conflicts of interest and eliminate ethical risk associated with accepting overvalued donations of land and conservation easements, the land acquisition staff will do the following:

1. At the beginning of each negotiation, they will notify (preferably in writing) the prospective donor of the requirements under Section 170(h) of the Internal Revenue Service Code (for conservation easement donations) and Section 1.170A-13(c) of the United States Treasury Department Regulations (for land donations) that must be met in order to qualify for charitable tax deductions.
2. They will make no assurances of the potential tax benefits of land or easement donations and will encourage the landowner to obtain his/her own legal and tax advice.
3. They will notify, preferably in writing, any potential land or easement donor who may seek a federal or state income tax deduction that he/she (not the Land Trust) is responsible for the determination of the value of the donation, and that he/she should obtained a qualified appraisal from an appraiser who follows the Uniform Standards of Appraisal Practice.
4. They will request a copy of the completed qualified appraisal report, and if they have any questions regarding the valuation of the gift or the donor's conformance with tax laws, they may elect, under the guidance of the Board of Directors, to disclose these reservations to the landowner. The land acquisitions staff, under the guidance of the Board of Directors, may attempt to resolve such issues with the landowner or elect to refuse the gift. Under no circumstances will the Land Trust knowingly accept a donation where such issues exist and cannot be resolved.
5. They will require that the donor's appraiser provide a separate certification to the Land Trust attesting that:
    a. The appraiser is a "Qualified Appraiser," as defined in Section 1.170A-13T(c)(5) of the United States Treasury Department Regulations
    b. The appraiser is state certified
    c. The appraiser has used the Uniform Standards for Appraisal Practice in his/her appraisal
    d. The appraiser is not barred from practice before the Internal Revenue Service or Treasury Department or other administrative bodies

e. The appraiser has accounted for any value enhancement issues to nearby property of the donor or parties related to the donor

f. If the appraisal is being made for a donation by someone determined by the Board of Directors to be an "insider," the appraiser will further certify that he/she is aware of the relationship between the donor and the Land Trust and that this relationship in no way influenced the appraiser's determination of the property's fair market value.

6. They will require that the donor provide the Land Trust with a fully completed and accurate Form 8283.

7. They will send a gift acknowledgement letter to the donor following donation acceptance that will restate the proclamation on Form 8283 that the Land Trust does not take a position on either the value or the tax deductibility of the gift.

IV. Powers

Any alteration to this policy shall represent the formal position of the Land Trust's Board of Directors. Final action on any project shall reflect a vote of the Board of Directors.

The Nature Conservancy — Sales To or From Related Parties

Policy:

It is the policy of The Nature Conservancy to prohibit both the purchase of real estate (or any interest therein) from and the sale of real estate (or any interest therein) to any "related party." For this purpose, a related party includes:

a. Any individual who is, or who was at any time during the 12-month period ending on the date of the purchase or sale, a member of the Board of Governors, a Trustee, or an employee of the Conservancy;

b. Any individual who is a close relative of such an individual; or

c. An entity in which the individual owns and/or his close relatives own directly or indirectly more than five percent of the equity interest therein.

Purpose:

To assure and ensure that The Nature Conservancy lives up to its high fiduciary obligations and operate in accordance with our highest corporate value: "Integrity Beyond Reproach."

This policy deals specifically with transactions involving the potential sale or purchase of real estate to or from a Board of Governors member, a Trustee, or a Conservancy employee (or their close relatives). While these transactions have been governed in the past by the Conservancy's Conflict of Interest Policy (requiring disclosure and potential action), this Policy goes beyond the existing Conflict of Interest Policy and absolutely prohibits these transactions. Although sales of real estate to Board of Governors, Trustees, or employees have been infrequent, the Board of Governors felt that any sale or purchase of real estate to these related parties could be perceived as a breach of the high standard set for the organization, and accordingly, prohibited any of these transactions. This policy also specifically prohibits sales to or purchases from Board of Governors, Trustees, or employees of interests in real estate — including sales and purchases of conservation easements.

This policy is separate but complementary to the existing Conflict of Interest Policy. All potential conflicts of interest — other than purchases and sales of lands — will continue to be handled in accordance with the Conservancy's existing Conflict of Interest Policy.

For purposes of this Policy, "close relative" has the same definition as applied in the Conservancy's Conflict of Interest Policy: Spouse, child (natural or adoptive), parent and step-parent, in-laws, grandchild, grandparent, brother or sister of the employee or Governor or Trustee are all close relatives. Also any person with whom a related party shares living quarters under circumstances that closely resemble a marital relationship or is financially dependent upon the employee, Governor, or Trustee is considered a close relative for purposes of this policy. Note, the definition of a related "entity" as set forth in this policy ("an entity in which the individual owns and/or his close relatives own directly or indirectly more than five percent of the equity interest therein") applies to this policy only. For purposes of this policy, "related organizations" will not be included unless the party owns more than a five percent equity interest in the organization.

Notwithstanding the foregoing, this policy shall not prohibit the following activities:

1. The use of Conservancy real property and improvements by employees and their families for residential or other purposes, as a condition of employment with the Conservancy; provided such use meets the legal standards for a "condition of employment," and is addressed in the employment agreement.
2. Use of Conservancy real property and improvements by employees and their families for residential or other purposes, *not* as a condition of employment, provided such use has received the approval of the Operating Unit Director upon consideration of the following factors:
    a. the impact of the proposed use on the conservation goals for the property;
    b. the likelihood of significant public relations impact in the community or with the general public;
    c. whether the terms and conditions of the agreement with the employee have been negotiated at arm's length and are in writing;
    d. the rental value is substantiated by independent evidence of fair market value;
    e. whether fair market rent is charged for the use, or the value of such use is reflected on the employee's W2 form (when required under IRS laws and regulations); and
    f. the precedent created by allowing the use.

Origin:

Approved by the Board of Governors on June 13, 2003; amended by the Board of Governors on September 30, 2004.

References, Resources, and Explanatory Notes:

See Conflict of Interest Policy; Standard Operating Procedure on the Taxability of Housing Provided by The Nature Conservancy; Compatible Human and Economic Use Activity; and Memorandum to the Senior Managers from the Conservation Region Managing Directors dated November 17, 2003 on the Taxable Treatment of Fringe Benefits. Refer also to Worldwide Office Legal Function for additional information.

The Nature Conservancy — Tax Deductions for Contributions of Land by Members of the Board of Governors

Policy:

It is the policy of The Nature Conservancy that no member of the Board of Governors, and no organization that is a Governors-related entity (as defined under the Conflict of Interest standard operating procedure), may take a charitable contribution income tax deduction for any gift of land to the Conservancy unless the transaction has been subjected to strict scrutiny. The objectives of such strict scrutiny shall be to ensure that legitimate conservation purposes are served by the transaction, that there is independent economic substantiation of value for the transaction, that any real or perceived conflicts of interest are disclosed, and that any issues of public perception are addressed. More specifically, the following items must be addressed and reviewed:

1. Conservation Standards: Gifts of land or easements from Board members, or from their companies, must meet specific conservation standards. Such gifts will be accepted only when they serve legitimate conservation purposes as defined by the principles of *Conservation by Design*, when the conservation value of the proposed donation has been verified based on an independent conservation review, and when the Project Activity Review Committee has reviewed the conservation benefit of the land or easement donation.

2. Valuation Substantiation: Such gifts must also meet specific economic standards beyond those which have been adopted in the Conservancy's policies and standard operating procedures for IRS Forms 8282 and 8283. Gifts will be accepted only when an independent review of market value has been conducted, when value is judged to be within a reasonable range of value claimed by the donor, and when the Project Activity Review Committee has reviewed the economic terms of the land donation.

3. Conflict of Interest: Transactions must also be reviewed to ensure that no special arrangements are associated with the gift transaction. Contributions will be accepted only after the disclosure of all transaction terms and parties, review of compliance with TNC's conflict of interest policies (including member recusal), review to ensure the use of standard Conservancy conservation easement terms where applicable, and express approval of the transaction by the Board of Governors. The Audit Committee will be responsible for reviewing conflict of interest issues and any special terms related to the Conservancy's on-going ownership of the property or easement.

4. Public Relations: The proposed gift must be reviewed to anticipate likely public or community relations reactions and to ensure that a plan is in place to address any adverse consequences. Project Activity Review Committee will be responsible for reviewing public relations issues.

Purpose:

To implement Recommendation No. 6 of the Governance Advisory Panel Report dated March 19, 2004, as revised and approved by Resolution of the Board of Governors adopted on June 12, 2004.

Origin:

Approved by the Board of Governors on September 30, 2004.

References, Resources, and Explanatory Notes:

Refer to the Worldwide Office Legal Function for additional information.

Vermont Land Trust — Transactions with Insiders

MEMORANDUM

TO: Field Team, Rick Peterson and Leslie Ratley-Beach

FROM: Gil Livingston

DATE: April 14, 2004

RE: Transactions with VLT "Insiders"

The Nature Conservancy investigation has had some salutary effects, and some by-products that are unfortunate. Management Team has discussed the TNC issues periodically as *The Washington Post* investigation unfolded. In the midst of the investigation, the provisions of Sarbanes-Oxley (S-O) went into effect. These Federal statutory provisions, designed to help manage the more egregious corporate practices that have surfaced over the last few years, apply in only minimal respects to non-profit entities. But we are discussing the extent to which VLT may elect to put systems in place not required by S-O, but systems that are prudent none-the-less. Finally, our Board's Monitoring Committee may also engage in a discussion of these topics over the coming months.

Among the issues raised in the TNC investigation and also addressed by S-O is "insider dealing." Because it may take some time for MT to wend its way through these issues and for the Board to evaluate a package of S-O related issues, we would like to put in place an interim system focused on "insider" transactions.

Starting immediately, please follow the following protocol:

1. "Insider" for the purpose of this protocol means: (a) any employee, board member or major donor of the Vermont Land Trust, (b) any member of a Board member's or employee's family (defined to mean spouse, parent, siblings, children and any other relative residing within the household), and (c) any organization with which an employee or Board member is affiliated. A "major donor" (for the limited purpose of this protocol) is any person, couple, family, partnership or corporation which has ever donated $1,000 or more to VLT (cash, stock, land or other asset) in one lump sum not in the aggregate.
2. Before Field Team members commit to a transaction with an Insider please notify Rick Peterson if you know the landowner is an Insider. This means before signing a:
    - Letter of agreement on an easement donation,
    - Purchase and sale agreement or option agreement on a purchase, or
    - Pledge agreement on a deferred easement donation.
3. Linda will ask Dawn Lee to check the VLT donor database at the time an LSR is requested to ascertain whether the landowner is a "major donor" as defined above, unless Field Team has identified the landowner as an Insider or noted in the LSR that they have already checked the database. If Linda discovers that the landowner is an Insider, she will notify Rick.
4. Before seeking Board ratification of an Insider transaction, Rick will prepare and send to me a *brief* "disclosure statement" describing:
    - The nature of the transaction.
    - The public conservation benefit of the transaction and whether the target parcel meets VLT's project selection criteria.
    - A description of any significant variation in the conservation easement terms and conditions from VLT's base documents.
    - A description of any significant variation in the income or expense budget, especially focused on the treatment of expenses typically underwritten by the landowner.
    - In the case of a land or easement purchase, the basis for our conclusion that we are paying not more than the fair market value of the property interest.

5. Certain stewardship decisions could also trigger apparent or actual conflict issues: easement releases, other amendments, subdivisions, house site relocations. I ask that Leslie use her judgment in defining "major" stewardship actions, and any such action on behalf of an Insider should follow the same protocol outlined in paragraph 4.
6. I will discuss each Insider transaction with Darby and communicate the outcome with Rick or Leslie. It is likely that every non-donor Insider transaction will require formal Board approval before we close, so we should all plan accordingly.

Notes

Check Your Progress

Before continuing on to the Action Plan, check that you:

- ☐ Understand why transactions with insiders are subject to a high degree of scrutiny by the public and under the law;
- ☐ Appreciate the serious financial penalties and other claims that may be imposed on insiders, land trust managers and their land trust as a result of participation in an insider transaction determined to be impermissible under federal and/or state law;
- ☐ Know how to advance a discussion of transactions with in-siders in your land trust;
- ☐ Explore when a transaction with an insider may occur;
- ☐ Become familiar with the terms *private inurement, private benefit* and *excess benefit transaction*;
- ☐ Understand how to manage transactions with insiders, including:
  - ☐ Following the conflict of interest policy;
  - ☐ Documenting that the project advances or is consis tent with the land trust's mission;
  - ☐ Following all transaction policies and procedures;
  - ☐ Ensuring that there is no private inurement or imper missible private benefit;
  - ☐ Obtaining a qualified independent appraisal for pur chases from, and sales of property to, insiders;
  - ☐ Marketing a property widely to meet the specific re quirement of the practice; and
  - ☐ Documenting the decisions taken and procedures followed in a transaction involving an insider; and
- ☐ Understand how other land trusts have managed transactions with iniders, and, especially, how land trusts market properties for sale (when and how to market, restrictions imposed, etc.).

Action Plan

As a result of studying the material in this course, there are many things that you will want to share with the rest of your land trust. "Next Steps" and the "To-Do Sheet" will help you plan your strategy.

Next Steps

We recommend that you undertake these steps, if you have not done so already, to apply what you've learned from this training to improve the operation of your land trust.

1. Have your board pass a resolution adopting *Land Trust Standards and Practices* as the ethical and technical guideline for the responsible operation of your land trust.

   Working through "Putting It into Practice" exercises 1 and 2 of chapter 1 (pages 28–46) with land trust personnel may be helpful to convince your land trust board why it should adopt Land Trust Standards and Practices.

2. Have your board consider supplementing its adoption of *Land Trust Standards and Practices* with a statement of values and/or statement of ethics.

   Working through "Putting It into Practice" exercises 1, 2, and 3 of chapter 1 (pages 28–46, 52–54) with land trust personnel will be helpful to your land trust in developing a statement of values and/or a statement of ethics.

3. Have your board pass a resolution adopting a conflict of interest policy if it has not done so already, or if it has already done so, have your board review its conflict of interest policy to ensure that it is current and up to date.

   Working through "Putting It into Practice" exercises 1 and 2 of chapter 2 (pages 82–95) with land trust personnel will be helpful to your land trust in developing or revising a conflict of interest policy for your land trust.

4. Have your board consider supplementing its conflict of interest policy to address transactions with board (and former board) members if it has not done so already or, if it has already done so, have your board review its policies and procedures regarding transactions with board (and former board) members to ensure they are current and up to date.

   Working through "Putting It into Practice" exercises 1 and 2 of chapter 3 (pages 138–142, 146–149)with land trust personnel will be helpful to your land trust in supplementing its conflict of interest policy to address transactions with board (and former board) members.

To-Do Sheet

Ethics

To Do	Who is Involved	By When

Conflicts of Interest

To Do	Who is Involved	By When

Transactions with Insiders

To Do	Who is Involved	By When

Glossary

Conflict of Interest: A conflict of interest arises when a person in a position of authority in an organization, such as a director, officer, manager, or other "insider," is in a position, or perceived to be in a position, to be able to benefit personally (or create a benefit to a family member or other organization with which they are associated) from a decision he or she could make.

Conflict of Interest Policy: A conflict of interest policy consists of a set of procedures to follow to avoid the possibility that those in positions of authority over an organization may receive an inappropriate benefit.

Disqualified Person: A person who, at any time during the five years prior to the transaction, was in a position to exercise substantial influence over the affairs of the organization, including his or her family members and entities 35 percent or more of which are controlled by them. This will generally include directors and officers, except for honorary or nonvoting advisory board members, the CEO, and other executive staff. Under a facts and circumstances test, it could even include an organization's major donors.

Excess Benefit Transaction: A transaction in which a "disqualified person" receives a benefit from an organization that is greater than the fair market value of the service, payment or property provided in return. Under federal tax law, if a public charity such as a land trust engages in a transaction with an organizational insider through which it confers an "excess benefit" (i.e., more than is reasonable) to the insider, an excise tax may be imposed on the insider and on the organization managers involved in the transaction.

Fair Market Value: The price for which property or the right to use property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell or transfer property or the right to use property, and both having reasonable knowledge of all the relevant facts.

Insiders: Board and staff members, substantial contributors, parties related to the above, those who have an ability to influence decisions of the organization, and those with access to information not available to the general public. The IRS generally considers "insiders" or disqualified persons under IRC Section 4598 to be persons who, at any time during the five-year period ending on the date of the transaction in question, were in a position to exercise substantial influence over the affairs of

the organization. "Insiders" generally include: board members, key staff, substantial contributors [see IRC Section 507(d)(2)], parties related to the above (defined below) and 35 percent controlled entities. While these are strict definitions within the tax code, land trusts are advised to take an even more proactive approach to the potential damage that conflicts of interest may cause an organization and also include in the definition of "insiders" all staff members and those with access to information not available to the general public (such as certain volunteers). Related parties is defined by the IRS to include spouse, brothers and sisters, spouses of brothers and sisters, ancestors, children, grandchildren, great-grandchildren, and spouses of children, grandchildren and great-grandchildren.

Letter of Opinion: A written estimation of a property's value, most often prepared by a qualified appraiser. A letter of opinion may be used instead of a qualified independent appraisal when the economic value of the property is so low as to negate concerns about private inurement or private benefit or when a full appraisal is not feasible before a public auction. (A letter of opinion is not sufficient in the case of transactions with insiders.) An appraiser may call this document a Restricted Use Appraisal Report.

Organization Manager: Any officer, director or trustee of the organization, or any person with similar powers or responsibilities, including, potentially, an executive director.

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. The IRS prohibition on private benefit is absolute. Incidental benefits are considered to be those benefits that are insubstantial when measured in the context of the overall public benefit conferred by the activity. Incidental benefits occur as part of the nonprofit's public purpose and activity, which cannot be achieved without benefiting some private individuals. For example, the incidental benefits to an adjoining property owner that typically result from a conservation easement both fall within the land trust's mission and are insubstantial in the context of the overall benefit of protecting the property. Such incidental benefits to the adjoining property owner would not be considered a private 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 inurement is absolute. The IRS also

imposes penalties on directors, officers, key employees, and other insiders who engage in transactions that confer an excess benefit on the individual (the so-called "excess benefit transactions" described in chapter 3).

Qualified Independent Appraisal: An independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real-estate experience.

Reasonable Compensation: The amount that would ordinarily be paid for like services by like organizations under like circumstances as of the date the compensation arrangement is made. Reasonable compensation is important because excessive benefits in the form of compensation to disqualified persons may result in the imposition of excise taxes and jeopardize the organization's tax-exempt status.

Widely Marketed: Announcing the availability of a property for sale to lists of prospective buyers through websites, mailings, and listings in newsletters and other publications or media. "Widely marketed" does not require public listing with a real-estate agent.

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