

Donation Agreements



A donation agreement may be used to ensure that a donor’s promise can be relied upon, set the expectations of both donor and donee, and prevent misunderstandings.

- Introduction 1
- Assessing Need for an Agreement 1
 - Agreement Needed to Evidence Restrictions..... 1
 - Arguments Against a Donation Agreement..... 2
 - Arguments for a Donation Agreement 2
 - Promises to Donate Rarely Enforced 3
- Consideration: A Necessary Element 3
 - Reliance on the Promise 3
 - Formal Substitutes 3
 - Nominal Consideration..... 3
- Binding Agreement Does Not Preclude Deductibility .. 4
- Issues Addressed in Donation Agreements..... 4
 - Timing of Payment..... 4
 - Refund or Redirection of Payment..... 4
 - Special Conditions or Continuing Obligations 5
- Agreements for Conservation Easement Donations 5
 - Functions of the Agreement 5
 - The Model..... 6
 - Objectives..... 6

INTRODUCTION

A simple promise to donate may be all an organization needs from a donor. However, before investing substantial time, money, and credibility in a larger-scale project, an organization may want to minimize the potential for misunderstandings and make a donor’s promise to support the project a legally binding obligation. A carefully crafted donation agreement can accomplish this; it can ensure that there is a meeting of the minds between a donor and donee as to the amount and timing of the donation and other important issues that may need to be addressed to assure a mutually satisfactory experience.

This guide looks at the situations where it is desirable to create a legally enforceable promise to make a gift and describes ways to do so. It generally avoids covering material addressed in the guide [*Restricted Gifts: Issues to Consider Before Making or Taking a Gift for a Specific Purpose*](#). Readers are encouraged to review that guide, particularly the section entitled “The Donation Agreement,” in conjunction with this guide.

The guide [*Donations of Stock and Other Securities*](#) discusses the benefits of donating stock rather than cash, the procedure for doing so, and the applicability of donation agreements in particular circumstances.

ASSESSING NEED FOR AN AGREEMENT

Charitable organizations routinely solicit commitments for future contributions to support the organization or particular projects. These commitments are sometimes referred to as pledges. They may be oral or contained in an informal writing such as a signed pledge card or a letter. Promises to make a future donation may, *if properly documented*, be relied upon in Pennsylvania as a binding contract and, if the donor fails or refuses to satisfy its commitment, may be enforced by judicial action.

A donation agreement can provide this documentation. It can also set forth expectations and understandings to assure a satisfactory experience for both donor and donee. A challenge is to distinguish the set of circumstances calling for a donation agreement from the vast number of times a simple pledge will suffice.

Agreement Needed to Evidence Restrictions

A donation agreement is always necessary when the donor will impose, and donee will accept, certain conditions or continuing obligations pertaining to the gift. For example, formal, written agreements are needed for:

- A donation subject to restrictions that allow the donor control over the future use of the donation;
- A donation to be held, invested, or disbursed pursuant to certain agreed-upon terms; and
- A donation that will result in naming a property or project after the donor.

Under these and similar circumstances, both the donor and the donee have a heightened interest in having the terms of the gift clearly evidenced to avoid future misunderstanding. The donation agreement is not discretionary and, thus, the arguments for and against set forth below are irrelevant.

Arguments Against a Donation Agreement

The Stakes Are Minimal

What are the consequences if a donor fails to deliver on a pledge? If the likely outcome is little or no financial hardship or other substantial damage to the organization and its work, then there's no need to insist upon a donation agreement.

Risk of Offending the Donor

A donor could be offended by a request for a donation agreement formalizing their pledge, believing that such a request questions their trustworthiness or financial capacity. While this can be viewed as cause to forego a request, it alternatively can be viewed as a reason for careful communication of the request. When donor sensitivity could be an issue, it is important for the conservation organization to have an inoffensive rationale for the requested agreement and a strategy for clearly communicating it to the donor.

Arguments for a Donation Agreement

Risk of Donor's Death

An excellent reason for a donation agreement is that, in the event of a donor's premature death, the donor's estate may not be willing or able to honor a promise of a gift not properly documented so as to constitute a legally binding contract. The estate is always permitted—and legally obligated—to honor contracts made during the lifetime of the

decedent. This justification for requiring a donation agreement is highly useful because it applies universally and without regard to the trustworthiness or creditworthiness of the donor.

Risks of Project Disruption and Loss of Reputation

A promised contribution may incentivize an organization to take steps or adopt a plan of action desired by the donor. Motivated by the magnitude of the anticipated contribution, the organization might move forward with an otherwise infeasible program or project. It may make public announcements, solicit other donors to contribute to the effort, and otherwise stake its reputation on the expectation that the necessary funding is in hand. An organization may want a donation agreement to protect it from these vulnerabilities.

Risks of Economic Loss

If an organization will make substantial expenditures in reliance of a promised gift or will otherwise bear a loss if the promise is not kept, a donation agreement may be prudent, if not necessary.

Example: The conservation organization wants to acquire a parcel of land important to its mission. It has sufficient funds for the deposit but must rely on donor contributions to pay the balance. Before it risks losing a non-refundable deposit or invests other substantial sums in due diligence investigations, the conservation organization needs assurance via donation agreements that the donor will keep promises to contribute funds needed for closing.

Example: Conservation organizations commit staff time and incur a variety of out-of-pocket expenses to bring a conservation easement donation to fruition. The organization needs protection to ensure it is fully reimbursed whether the easement is consummated or not. Furthermore, the organization must consider that each easement added to its portfolio increases the risk of future enforcement action. Before investing in easement preparation work, the organization needs a firm

agreement regarding the amount and timing of contributions to defray the organization's expenses, both short-term (through the easement closing date) and long-term (for administration and enforcement of the easement in perpetuity).

Promises to Donate Rarely Enforced

A review of court cases indicates that actions for failure to make a promised donation are rare. The reason may be that potential donors do not make promises that they won't keep. Another may be that charitable organizations deem the cost of enforcement—not only in litigation but in public and donor relations—not worth the benefit of collecting the promised gift. Sometimes, however, the harm to an organization from a donor failing to honor a commitment outweighs the costs and risks of enforcement.

CONSIDERATION: A NECESSARY ELEMENT

"Consideration" is a legal term that means something of value received for a promise. When a person who makes a promise receives nothing in return, the law does not require the promise to be kept unless the court finds a legally sufficient substitute for consideration. To maximize the enforceability of a promise, the donation agreement should include at least one, and *preferably all*, of the following substitutes for consideration:

- Reliance on the promise;
- Formal substitutes; and
- Nominal consideration.

Reliance on the Promise

As illustrated by the examples in the preceding section, a donation promise may, and often does, result in the conservation organization taking steps in reliance on receipt of the donation. If the donation doesn't materialize, and a

court finds that such steps were reasonable and taken in good faith in reliance on the donation, the court can find:

- First, that a legally binding contract existed;
- Second, that the donor violated it; and
- Third, that the conservation organization is entitled to a remedy such as a judgment to compensate it for its losses.

A well-drafted donation agreement will include a description of the investment in time and money or other prospective detriment that the conservation organization is likely to incur in reliance on the promised donation.

Formal Substitutes

Pennsylvania recognizes **two** formal substitutes for consideration to include in a donation agreement:

- Add the word "Seal" next to the signature lines.
- Add the phrase "intending to be legally bound" above signature lines to bring the agreement into the protection of the Uniform Written Obligations Act (adopted only in Pennsylvania).

Nominal Consideration

Contracts (whether or not donation agreements) often begin with a recitation of nominal consideration such as "in consideration of \$1.00" and may continue to add a phrase such as "and other good and valuable consideration the receipt of which is hereby acknowledged." The purpose of reciting nominal consideration is to assure that, if there is no actual consideration passing between the parties (as, for example, in a donation agreement), the promises contained in the document will be recognized as a binding contract.

If both parties are making promises in the agreement, then a more specific recitation of consideration may be included. The following recital of consideration in a stewardship funding agreement is one example:

in consideration of the mutual promises of [easement holder] to accept responsibility for

administration of a conservation easement on donor's property and the promises of donor to make the stewardship funding available as and when required under this agreement.

BINDING AGREEMENT DOES NOT PRECLUDE DEDUCTIBILITY

If a contribution is not voluntary, it is not a donation deductible for federal income tax purposes. This raises the question: if someone enters into a legally binding agreement to donate property or cash to an organization, is the contribution still considered voluntary? Fortunately, the courts have confirmed that a donation may be voluntary notwithstanding that its terms of payment are governed by a legally enforceable donation agreement.

ISSUES ADDRESSED IN DONATION AGREEMENTS

Timing of Payment

A fundamental purpose of any agreement evidencing a cash donation is to set the amount of the donation and the time or times of required payment. Typically, the promised sum is to be paid in full on or before a specific date. Other payment arrangements may work well in other instances; for example, a donation may be more affordable if made in accordance with a schedule of payments over time or upon the occurrence of a future event. The guide [*Stewardship Funding Arrangements: Options for Financing the Obligations of Conservation Easement Holders*](#) and the [*Model Stewardship Funding Covenant*](#) furnish examples of arrangements for deferred funding of a cash donation that may be adapted to apply to cash donations (whether or not the donations are for the stewardship purposes that are the focus of that guide and model).

Refund or Redirection of Payment

Non-Refundable

Unless an agreement is made otherwise, a donation is ordinarily not refundable once received by the organization. A provision in the donation agreement can make this clear. For example:

Donations are to be forwarded to the organization at the address set forth below. All donations become the property of the organization upon delivery and are non-refundable unless otherwise specifically provided in this donation agreement. This donation agreement is the entire agreement of donor and the organization and supersedes in full any prior or contemporaneous written or oral statements of the parties or any course of conduct of the parties.

Escrow

A provision may be included in the donation agreement to establish that the donation will be returned to the donor if the cash or other item delivered never became the property of the donee. For example:

Cash donations raised for the project will be delivered to and held in escrow by _____, as escrow agent, and disbursed only to fund acquisition of the Property. If the acquisition fails to close on or before a certain date, the donation amount deposited by the donor under this agreement will be returned to the donor. The donation will not be acknowledged as received by the donee unless the donor waives in writing any right to a refund of the donation either pursuant to this agreement or otherwise under applicable law.

Transfer Is Conditional

If there is an understanding that the donation is being delivered conditionally depending upon a certain future event happening, the agreement may include a provision that the donation may be refunded. For example:

The donation is given conditioned upon the donee receiving grant commitments of not less than \$_____ (the “required grant funding”) to fund the project within a maximum time period of one year following receipt of the donation. If the required grant funding is not received within the maximum time period, the donor has the right to reimbursement in full of the donation for failure of condition unless the donor, without any obligation to do so, extends the maximum time period in writing.

Redirection

If a donation is made for a specific purpose, nothing is said about whether it can be used for other purposes, and the specified purpose fails to occur, the disgruntled donors may claim they were misled to their detriment by the organization’s representations. Or, they may claim that the donation was conditioned upon occurrence of an event which failed to occur, and, due to the failure of that condition, they are entitled to a refund. A provision crafted to provide the donee a right to make alternative use of the donation avoids those claims. It is also useful in the happy circumstance that more cash is raised than needed. For example:

Donations for Save the Park are to be used for the purposes described in this agreement and other purposes identified by the organization to conserve open space and provide opportunities for outdoor recreation in Greene Township.

Special Conditions or Continuing Obligations

The section “Donation Agreement Needed to Evidence Restrictions” includes examples of instances which call for clear documentation of the rights and obligations of both the donor and the organization with respect to the use and management of the donation. Each situation is different and legal assistance is needed not only to assure accuracy in the donation agreement as to the understandings of the parties, but also to avoid adverse tax consequences.

The guide [*Restricted Gifts*](#) offers insights on topics pertaining to restricted gifts and drafting a donation agreement.

AGREEMENTS FOR CONSERVATION EASEMENT DONATIONS

Functions of the Agreement

Most conservation projects begin with a series of communications, often face-to-face conversations, between the interested landowners and representatives of the conservation organization. In these communications, everyone is exploring what the project might look like and trying to ascertain whether their respective needs and goals can be met. The time and resources spent by landowners and organizations in these initial explorations tend to be modest. However, there comes a point—if the parties have a serious interest in proceeding and have essentially finished conceptualizing and determining the feasibility of the project—when the next easement planning steps will require substantial investments of time and money. At this stage, an organization may want assurance that it won’t get stuck covering the expenses of moving forward with the project if the landowners decide later not to complete the easement. And landowners may want assurance that the organization is truly committed to the project before they incur further expense.

A well-written donation agreement can provide these assurances. It can also serve other functions:

- It can clearly spell out the remaining steps and expectations in the easement process.
- It can allocate responsibilities for costs and completion of tasks.
- While the landowners and organization may believe, based on their less formal exchanges of information, that they share the same understanding of the project, this may not be so. The process of completing a donation agreement can smoke

out potential differences in perspectives and minimize the potential for disputes as the project approaches completion.

- Landowners sometimes come to think that they are the customer and any good service provider should recognize that “the customer is always right.” An agreement can help dispel this notion, clarifying that the organization, although friendly and reasonably accommodating, is serving its conservation mission, not the landowner.
- An agreement can help an organization ensure that it is taking adequate precautions in avoiding tax shelter transactions prohibited by [Land Trust Standards and Practices](#).
- Sometimes projects don’t work out as anticipated. The agreement can address the circumstances when the donor or organization may withdraw and, in either case, what conditions (such as reimbursements) may be needed to avoid hardship.

The Model

The [Model Conservation Easement Donation Agreement](#) published by WeConservePA is designed to serve the functions described above. An organization may use it as is, make any number of customizations, or borrow from it to improve the organization’s existing templates. The model’s commentary explains the purpose of each provision in the model, refers the user to pertinent publications for deeper or more expansive analysis of legal issues, and provides alternative and optional provisions.

Objectives

The donation agreement affords the opportunity for each party to have its objectives acknowledged.

Conservation Objectives

An early and mutual understanding of a proposed easement’s conservation objectives is key to the planning and documentation process. These objectives are developed through site visits and discussions between the landowner

and conservation organization. To understand the universe of possible objectives, the landowners may find it helpful to review the conservation objectives provided in article 1 of the [Model Grant of Conservation Easement and Declaration of Covenants](#) and the model’s commentary.

Tax Objectives

The landowner may also have tax planning, estate planning, or land planning objectives. The donation agreement affords both parties the opportunity to discuss these objectives, the extent to which the organization assumes any obligation to further them, and the circumstances under which the landowner may withdraw if not met. Some potential easement donors do not desire to, or cannot afford to, fund easement stewardship or permanently reduce their property value without the availability of a federal income tax deduction. The donation agreement furnishes them the opportunity to negotiate rights to withdraw if they are not satisfied with the prospective tax benefit estimated by their tax advisors and appraisers. The donation agreement provides the conservation organization the opportunity to clarify that it takes no responsibility whatsoever to agree to easement provisions that do not further its objectives or are otherwise inconsistent with its policies and procedures.

Objectives Not Consistent with Conservation Goals

Some landowners are interested in granting an easement for personal reasons, such as a desire to commemorate their family history. The discussion of mutual objectives gives the landowners the opportunity to make their expectations about the future known and allows the conservation organization to educate the landowners about its conservation mission and explore whether some of landowners’ interests may be accommodated without imposing restrictions having little or nothing to do with conservation of natural, scenic, or historic resources.

Donor requests and interests that may conflict with an organization’s conservation goals include the following real-life examples:

- The donor wants a restrictive covenant prohibiting hunting.
- The donor wants to prohibit horses because the donor doesn't view horse-related activities as a legitimate agricultural use.
- The donor does not want to restrict agricultural use in a riparian area because livestock have always grazed there.

A candid discussion of objectives at the project's inception may result in the organization accommodating some landowner objectives that may not fully square with its goals. But if the discussion reveals that the organization can't accommodate to the landowner's satisfaction, the organization can decline the opportunity before it invests significant time or resources in the project.



[Patricia L. Pregmon](#), attorney at law, and [Andy Loza](#) are the authors.

WeConservePA offers this guide thanks to support from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.

Nothing contained in this document is intended to be relied upon as legal advice or to create an attorney-client relationship. The material presented is generally provided in the context of Pennsylvania law and, depending on the subject, may have more or less applicability elsewhere. There is no guarantee that it is up to date or error free.

© 2023, 2018, 2012, 2011, 2010, 2009 WeConservePA
Text may be excerpted and reproduced with acknowledgement of WeConservePA.