
CANADIAN LAND TRUST ALLIANCE (CLTA)

ANNUAL CONFERENCE

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**Legal and Ethical Responsibilities of Board
Members**

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Legal and Ethical Responsibilities of Board Members

Land Trust Alliance and
Canadian Land Trust Alliance
Standards and Practices

Overview

- Introduction to "Land Trust" Ethics
- Conflicts of Interest
- Transactions with Insiders

"Land Trust" Ethics: Key Take-Away Points

- Purpose
 - Understand the importance of following ethical guidelines in land trust operation
- Why?
 - Preferential tax status is dependent upon land trusts operating within the public interest and maintaining public trust
 - To maintain this "public trust", land trusts must abide by the highest ethical standards

LTA-Standard and Practice 1D

The land trust upholds high standards of ethics in implementing its mission and in its governance and operations.



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CLTA-Standard and Practice 1D

The *land trust* upholds high ethical standards through being inclusive and through honesty, openness, transparency, fairness, integrity, and the avoidance of any perceived or actual *conflict of interest* in its governance and operations, including implementation of its mission.



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Ethical Obligations

To whom does a land trust have ethical obligations?



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Ethical Obligations

- To the public*
- To donors
- To the landowner
- To the taxpayer
- To the land
- To the land trust community
- To the community-at-large*

Obligation to the Public

- To prevent "private benefit" or "undue benefit"
- To ensure "public benefit"
- To meet the long term promise of land conservation
- Other

Obligation to the Public: Prevent Private Benefit

- What if a board member wants to donate land to a land trust?
- What if a land trust staff person serves on a local planning board?
- What if an executive director wants to hire her husband to provide legal services?
- What if a major donor wants an amendment to his easement?

Obligation to the Public: Ensure Public Benefit

LTA - Standard 8D

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...



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Obligation to the Public: Ensure Public Benefit

CLTA – Standard 8E

The *land trust* documents the condition of each property and the *important conservation values* and public benefit of each property, in a manner appropriate to the individual property and the method of protection.



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Obligation to the Public: Ensure Public Benefit

- What is public benefit?
- Does public benefit require consideration of community values?
- How can a land trust document public benefit?
- Is a list of conservation values the same as public benefit?



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Obligation to the Public: Public Benefit Scenarios

- Is there a public benefit from 200 acres of conserved land with 20 reserved 1 acre house lots?
- Is there a public benefit from a protected private golf course in a very developed area?
- Is there public benefit if the holder has no capacity or intention to enforce?

Obligation to the Public: Public Benefit Protection

- Selection criteria that include public benefit
- Strategic conservation plan
- Documentation of public benefit for each parcel
- Other

Obligations to the Community- at-Large

- Do land trusts have such an obligation?
- Who is included in the community-at-large?
 - The physical/natural community?
 - The human community?
 - Both? or do land trusts get to pick and choose?

Obligations to the Community-at-Large: Discussion Question

- Is it ethical 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?

Discussing Ethics Within Your Land Trust

- Board discussions
- Staff discussions
- Values statements
- Ethics resolutions

Conflicts of Interest: Key Take-Away Points

- Purpose
 - Provide tools to address and manage conflicts of interest
- Why?
 - Opportunities for conflicts, both real and perceived, are numerous
 - Fallout can be serious
 - Adopting and following policy is key

Avoiding Conflicts of Interest

LTA Practice 4A:

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...

Avoiding Conflicts of Interest

CLTA – Standard 4 and Practice 4A

The land trust has policies and procedures to avoid or manage real or perceived 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...

What is a Conflict of Interest?

- **Conflicts of interest** arise when insiders are in a position, or perceived to be in a position, to benefit financially by virtue of their position within the land trust.
- Principally arise from self-dealing and opposing loyalties of insiders.

What Persons Present Conflicts of Interest for Your Land Trust?

- Generally **Insiders**:
 - Persons who have an ability to influence decisions of the organization
 - Persons who have access to information not available to the general public
- Includes:
 - Board, key staff and key volunteers
 - Substantial contributors
 - Related parties to the above

Legal Issues Involving Conflicts of Interest

- Federal (USA)
 - **Private inurement**
 - **Private benefit**
- State
 - **Fiduciary duties** of directors (good faith, due care, and loyalty)
 - Specific state laws (e.g., state laws prohibiting or restricting loans)

Legal Issues Involving Conflicts of Interest

- Federal (Canada)
 - Income Tax Act – Undue Benefit
- Provincial
 - Fiduciary duties
 - Statutory requirements
 - Ontario – strict common law prohibition

Public Perception Matters

- Perception of a conflict of interest often as damaging as an actual conflict.
- High risk of public relations and credibility problems associated with both real and perceived conflicts.
- Managing public fallout can be a substantial drain on board and staff time and resources.

Case Study: The Nature Conservancy

- 2003 *Washington Post* stories
 - Perceived conflicts of interest
- Upshot
 - Internal top-to-bottom review of organization and its practices
 - Senate investigation
 - IRS audit
 - Changes to conflict of interest policy

Conflict Management

- Have a written policy
 - Identify who it applies to
 - Identify disclosure process
 - Identify what happens after disclosure
 - Specify documentation procedures
- Develop process to implement
 - Consider annual redistribution
 - Schedule for review and updates

Conflict of Interest Policy: Standard Elements

- Disclosure (preferably in writing)
- Recusal from vote, and generally from discussion
- Fairness to the land trust
- Explanation and enforcement of policy
- Written documentation

Conflict Scenarios

1. LT would like to pay board chair for her services as board chair.
4. Executive director proposes low interest loan from LT.
5. LT board member wants more landowner friendly terms in proposed conservation easement than is the norm.
9. LT board member tells daughter about landowner's plan to put conservation easement on property so that daughter can buy property next door that is for sale.
10. Board member tells another board of LT donor.

Conclusion: Conflicts of Interest

- Conflict transgressions are generally unintentional.
- Take steps to avoid conflicts and to ensure personnel is aware of their responsibilities:
 - Screen out potential board members who present "extreme cases of potential conflict."
 - Adopt and follow a written conflict of interest policy.
 - Increase transparency by dealing openly and making your policy available on your website.

Transactions with Insiders: Key Take-Away Points

- Purpose
 - Provide tools to address and manage transactions with "Insiders"
- Why?
 - Potential conflicts surface most commonly in real estate transactions involving "Insiders"
 - Transactions with "Insiders" require special attention
 - But other steps in the transaction are no different than other transactions not involving "Insiders"

Transactions with Insiders

LTA Practice 4C:

When engaging in land and easement transactions with insiders, the land trust:

- Follows its conflict of interest policy;
- Follows all transaction policies and procedures; and
- Ensures that there is no private inurement or impermissible private benefit. ...

Transactions with Insiders

CLTA Practice 4C

When engaging in land and *conservation agreement* 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 impermissible *undue benefit*...

Who Are "Insiders"?

- **Insiders:** persons who have an ability to influence decisions of the land trust and who have access to information not available to the general public.
 - Board and key staff and volunteers
 - Substantial contributors
 - Parties related to the above.

Why Are Insiders Treated Differently?

- Independent Sector:
"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."

Legal Issues Involving Transactions with Insiders

- **Intermediate sanctions (USA)** – Financial penalties "intermediate" to revocation of tax-exempt status
- **Excess benefit (USA)** – Amount conferred by transaction that is more than reasonable under the circumstances

Legal Issues Involving Transactions With Insiders

- Under USA federal tax law, if a public charity:
 - Engages in a transaction
 - With an organizational insider (e.g., director or officer)
 - Through which it confers an “excess benefit” (i.e., more than is reasonable) on the insider, an excise tax may be imposed on the insider and on the organization managers involved in the transaction (so-called “Excess Benefit Transaction”).

Legal Issues Involving Transactions With Insiders

- Initial penalty imposed on the organizational insider is 25% of the excess benefit.
- Penalties of 10% of the excess benefit (to a maximum of \$10,000 per transaction) may be imposed on one or more of the organization’s managers if they knowingly participated in the excess benefit transaction.
- Second-tier taxes of 200% of the excess benefit apply if the violation is not “corrected” within the taxable period.

Legal Issues Involving Transactions With Insiders

- Applicable regulations provide a safe harbor (“rebuttable presumption”) that payment to an organizational insider is reasonable, and not prohibited, if:
 - Transaction is approved by an “authorized body” of the organization.
 - Authorized body is free from any conflict of interest.
 - Authorized body considers appropriate data as to comparability.
 - Authorized body adequately documents the basis for its determination concurrently with making it.

IRS Notice 2004-41 (June 2004)

- Notifies donors of conservation easements and purchasers of conservation properties that IRS will disallow improper deductions
- IRS may impose penalties on donors and organizations that knowingly participate in an "excess benefit" transaction
- IRS may impose penalties on promoters and appraisers involved in improper deductions

Legal Issues Involving Transactions With Insiders

Income Tax Act, ss. 188.1(4) and (5) impose an intermediate sanction on land trusts that confer an undue benefit on:

- a member of the charity or of its governing board;
- a person who has contributed more than 50% of the charity's capital;
- a person who is not **at arm's length** to a person:
 - who is a member of the charity or its governing board; or
 - who has contributed more than 50% of the charity's capital; or
- a person who is not at arm's length to the charity.

Legal Issues Involving Transactions With Insiders

- The undue benefit does not necessarily have to come directly from the charity. It can also come from a third party if the charity instructs or allows the third party to redirect an amount that is legally payable to the charity.
- A charity is **not** conferring an undue benefit if it makes reasonable payment for property or services it receives from one of the persons listed above. Nor is it conferring an undue benefit if the person would be eligible for the benefit in the course of the ordinary operation of the charity's programs.
- For a first infraction, the penalty is 105% of the amount of the benefit. For a repeat infraction, the penalty is 110% of the amount, plus a year's suspension.

Conflict Management: The Nature Conservancy Case Study

- *Washington Post* articles called into question TNC so-called “conservation buyer” transactions
- To ensure continued public confidence in its transactions, TNC added a provision to its conflict of interest policies prohibiting property sales to or purchase from certain insiders



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Conflict Management Involving Transactions with Board Members

- Under what circumstances would your land trust supplement its conflict of interest policies to prohibit certain transactions involving board (and former board) members?



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Board Member Conflict Scenarios

1. Potential purchase of board member A property.
2. Board member B fails to disclose brother's involvement in property being acquired by land trust.
3. Board member C seeks easement amendment to build farmhouse as “farm accessory structure”.
4. Board member C builds farmhouse first and then claims it is a “farm accessory structure” later.



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Conclusion

- Consider an insider transaction against your ethical tests:
 - The Feel Test
 - The Grandmother Test
 - The "60 Minutes" Test
 - The Mission Test


