

Chapter One • Incorporating as a Nonprofit Corporation under State Law

Practice 2B: Nonprofit Incorporation and Bylaws

The land trust has incorporated according to the requirements of state law and maintains its corporate status. It operates under bylaws based on its corporate charter or articles of incorporation. The board periodically reviews the bylaws.

A land trust that raises money and holds land and/or easements is advised to incorporate as a nonprofit corporation, following the state's incorporation statute. Incorporation is a prerequisite for obtaining federal (and sometimes state) tax-exempt status and, as dictated by state law, helps shield board members associated with the land trust from liability for land trust actions. Bylaws outline the basic operating procedures of the land trust and should be reviewed regularly to ensure their relevance. Several states post sample bylaws on their web pages.

— From the *Background to the 2004 revisions of Land Trust Standards and Practices*

Learning Objectives

Upon completing this chapter, you should:

- Understand what it means to be a “nonprofit corporation”
- Understand the benefits of incorporating
- Understand the role of state laws governing nonprofits
- Be able to determine what is involved in remaining in good corporate standing in your state and why that is important
- Know how to obtain a “certificate of good standing” or other evidence of compliance with state nonprofit corporate laws
- Be able to describe the purpose of bylaws and the important components of a land trust's bylaws
- Be able to implement meaningful board review of bylaws
- Understand the importance of obtaining local expert legal advice when considering whether and how to incorporate as a nonprofit corporation
- Understand how your state's conservation easement enabling act interrelates with incorporation and bylaws

Summary

Most land trusts choose to organize under their appropriate state law as nonprofit corporations for a number of reasons. There are also significant legal requirements necessary to create and maintain this status.

This chapter is intended to familiarize land trusts with the issues related to incorporating as a nonprofit corporation under applicable state law and maintaining status in “good standing” over time. It also discusses corporate bylaws, the basic internal governing document for every nonprofit organization.

Any land trust not yet incorporated should engage a local attorney familiar with nonprofit law before pursuing formal incorporation to ensure those involved understand the process and the consequences of incorporation. Local counsel should draft or, at a minimum, review the documents required in the incorporation process.

Existing land trusts should periodically review their governing documents with local counsel. The law or a land trust’s circumstances may change over time requiring corresponding governance changes.

Evaluate Your Practices

Conduct a quick evaluation of your land trust’s practices. Guidance is provided on the following page.

1. Has your land trust incorporated under state law? If your land trust has not yet incorporated, has it considered other available options? Does it understand the costs as well as the benefits of choosing to create a separate corporate entity?
2. Does your land trust file required annual reports on time?
3. Does your land trust have a system for tracking reporting requirements?
4. Would your land trust be issued a “certificate of good standing” if needed? Would you know how to obtain one?
5. Does your land trust have bylaws?
6. Do all members of the board of directors have copies of the bylaws? Has the board reviewed the bylaws recently, preferably within the last year?
7. Does your land trust have ready access to a knowledgeable attorney when it needs advice on nonprofit corporate matters?

Guidance

To be in full compliance with Practice 2B of *Land Trust Alliance Standards and Practices*, a land trust should be able to answer “yes” to all of these questions.

To Incorporate or Not to Incorporate?

Organizing to Achieve Mission

There are a number of ways for individuals to work collectively toward a common conservation goal — and not all require creating a new organization. Options discussed below include:

- Operating without a formal structure
- Working through others
- Incorporating as a supporting organization
- Collaborating with another organization

The following sections addresses the details of choosing to incorporate as an independent, nonprofit organization. Each of these options is appropriate for certain situations but may not work in others. It is important to consider all the alternatives that may be available in selecting the best structure for your group.

Operating without a Formal Structure as a Loosely Affiliated Group of Individuals

Many land trusts and other nonprofit organizations begin as a loosely organized group of citizens sharing concern about a particular issue. This option permits maximum structural or organizational flexibility. It does not require compliance with the many regulations that govern formally organized nonprofit corporations (although it does not provide the associated benefits).

This arrangement can be particularly useful for groups that need to work together only for a short duration or that do not need continuity over time. It may be less useful for achieving long-term goals, particularly that of permanent land conservation.

For example, when neighbors are concerned about a single issue, such as the sale or development of a local city park, they may create an informal association in response to this threat. Giving themselves a

temporary name (“Friends of the Park”), they work together as long as necessary and then disband when their goal is met (the sale or development plans are abandoned).

Working through Others

A new, separate organization is not always necessary to achieve land conservation goals. An existing organization or government agency may be able to undertake the desired activity. This option may require concerned individuals to relinquish some control over the ultimate outcome, but it also relieves them of the responsibilities associated with establishing and maintaining an independent nonprofit corporation.

For example, people living around a lake or in a particular watershed may informally work together to raise awareness of local conservation needs, such as identifying lands in need of protection and contacting landowners interested in protecting their land. However, they rely on an established land trust to complete all real estate transactions needed to ensure long-term protection. This strategy provides the land trust with important local connections and the local residents with access to critical expertise.

This approach has been used extensively and successfully in Vermont, Maine, Minnesota and Georgia, as well as in other states. In Minnesota, for example, the Leech Lake Watershed Foundation actively promotes sustainability programs throughout its watershed. The foundation suggests to local community groups and lake associations that they can sustain the quality of their lakes and lake communities by assessing their local land protection needs and possibilities, then funneling conservation easement or other land projects to experienced land trusts or government agencies.

In New York, the Westchester Land Trust has organized local chapters to help it reach out to local communities within its geographic service area. These chapters are informally organized but have representation on the land trust’s board. They are not incorporated independently. The chapters focus on outreach, while the Westchester Land Trust completes all real estate projects and holds all conservation easements.

Models of Collaboration among Land Trusts, a research report prepared for the Maine Coast Heritage Trust, provides more detailed information on projects that have been completed using these types of arrangements. To download a copy, go to the Land Trust Alliance’s digital library at The Learning Center (www.lta.org/TLC).

Incorporating as a Supporting Organization

Some land trusts do not incorporate as wholly independent organizations but as supporting organizations of existing nonprofit corporations. A supporting organization is a separate corporation linked by mission and activity — and often by shared board members — with another, typically larger organization.

Although there is limited independence for a supporting organization, there are also tax exemption benefits related to this organizational structure. (See chapter 2 for more information on tax exemption and supporting organizations.)

A supporting organization can be used in a variety of situations:

- *Establishing a new land trust.* In the past, The Nature Conservancy, the Open Space Institute in New York and other larger land trusts have helped facilitate the start up and operation of smaller land trusts by making them their supporting organizations. Larger land trusts, however, will only want to accept the responsibility of becoming a controlling organization if it is consistent with their mission and purpose.
- *Creating an advocacy organization.* This mechanism can also be used to establish a separate land trust “arm” of a more advocacy-oriented conservation organization or the reverse. While this option can appear attractive, it may not provide a land trust with enough of a separate identity — if that is important — in the eyes of the public.
- *Separating conservation easement holding functions.* Increasingly, land trusts are using supporting organizations to hold conservation easements, to own land in fee or to manage an endowment. A supporting organization that meets the IRS test of being “controlled by” another public charity may also qualify to accept tax-deductible donations of conservation easements — assuming it otherwise meets the additional IRS requirements related to conservation easements. This structure may be used to prevent the possible extinguishment of a conservation easement resulting from merger if the land trust acquires the underlying fee, or to shield separately held assets from liability.

The Little Traverse Conservancy in Michigan has created a separate supporting organization for this purpose. Pheasants Forever and Ducks Unlimited, national conservation organizations, have also both created separate organizations to handle components of their conservation easement activities.



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Multiple corporate structures require additional recordkeeping and administration. A land trust must maintain the corporate structure for each organization and ensure that each complies with all applicable laws. Changes in the tax law in the summer of 2006 have added additional requirements applicable to controlling and supporting organizations. A land trust considering using this arrangement should make sure it has current information before making any final decisions. (See the section below.)

Collaboration between Organizations

Existing organizations considering taking on new responsibilities or activities often collaborate with other organizations rather than create a new organization.

Collaborations can be a wonderful opportunity to maximize the collective effectiveness of land trust work while avoiding the complexities of creating a new, separate organization. Collaborations can be challenging, however. Land trusts must clearly articulate their expectations from the beginning of the collaboration. For example, agreements should be in writing, and they should clearly delineate who does what, who pays for what and what outcomes or goals are expected by when.

There are other legally recognized forms of association, namely partnerships, sole proprietorships and unincorporated associations. Nonprofits typically do not use these arrangements because they do not provide for tax exemption and other benefits available through different organizational structures. For more information on creating successful collaborations, see *Models of Collaboration among Land Trusts*, available at the digital library on The Learning Center.

Incorporating as an Independent Nonprofit Organization

Most land trusts, particularly those owning land or holding conservation easements, have chosen to create a separate entity — a nonprofit corporation — through which to conduct business. As a corporation, the land trust itself, rather than the individuals associated with the land trust, is responsible for the financial, legal and business affairs of the organization.

Decisions in nonprofit corporations are, by definition, no longer made by individuals. Decisions are made collectively by a group — either by

the organization's board of directors (or "trustees" or "governors," as they are known in some states) or by the organization's members. A corporation must establish formal rules to govern how it makes and documents decisions and conducts business. These rules must comply with local, state and federal laws, regulations and reporting requirements. They include articles of incorporation, bylaws and resolutions.

State law determines how corporate entities are created and how they must operate. Various state agencies may be involved in the oversight of nonprofit corporations:

- The Office of the Secretary of State typically manages the process by which nonprofit corporations are created and maintained
- The Office of the Attorney General, or other state office, may also be responsible for general oversight of nonprofits, particularly those that solicit funds

Once established, most nonprofit corporations exist perpetually and must formally dissolve to cease operations.

Incorporating as a nonprofit corporation does *not* ensure exemption from paying income tax on revenues. That is a matter of tax law. (See chapter 2 for a discussion of tax exemption.)

Benefits of Incorporation

Formal incorporation as an independent nonprofit organization provides a land trust with a number of benefits:

- *An organizational identity.* Incorporation gives a land trust a separate existence, independent from the individuals operating it. This status allows a land trust to remain effective over time, as the involvement of specific individuals will inevitably change. It also helps create credibility for a land trust's activities because it indicates that the organization involves more than just a few concerned citizens.
- *A structure for decision-making.* The corporate structure requires more formal operating rules, which can be important for land trusts facing increasingly difficult decisions as they grow and expand their programs and activities. Again, this structure also gives the organization's decisions more credibility in the eyes of the community.



Incorporation helps shield individual board members, officers and others associated with the land trust from any financial liability resulting from the land trust's actions or decisions.

- *Limited liability.* One of the most important benefits of incorporation is that it helps shield individual board members, officers and others associated with the land trust from any financial liability resulting from the land trust's actions or decisions. This protection is particularly important for land trusts owning land or holding conservation easements. In contrast, individuals acting alone or through an unincorporated association may be held personally liable or financially responsible for their actions.
- *Prerequisite to federal tax-exempt status.* Incorporation is a prerequisite to obtaining federal (and sometimes state) tax exemption. Without this status, a land trust is unable to accept tax-deductible contributions. (See chapter 2 for more information on tax exemption.)
- *Prerequisite to holding a conservation easement.* State laws may vary, but most land trusts must incorporate to hold conservation easements. The Uniform Conservation Easement Act, adopted by 24 jurisdictions, provides that only governmental bodies or charitable corporations, charitable associations or charitable trusts may hold conservation easements. Federal tax law also requires charitable corporate status for a land trust to be a qualified conservation organization authorized to accept tax-deductible conservation easements. All land trusts must review their own state's real estate laws related to holding conservation easements to ensure they are properly organized with respect to this issue.
- *Increased donor confidence.* Many individuals, foundations and corporations will only give to incorporated organizations, even when those donors are not intending to take a tax deduction.

How to Incorporate

Nonprofit incorporation is a matter of state law. Each state has its own unique procedures and criteria governing incorporation. It is essential for a land trust to consult a local lawyer expert in nonprofit organizations as it works through this process.

While specific procedures vary from state to state, the typical process of incorporating under state law includes the following steps:

1. **Research Specific State Law Requirements for Incorporating**
In every state, the Office of the Secretary of State or similar state agency has information on the requirements and

processes to incorporate a new nonprofit organization. This information can often be found on that office’s website.

The website for the Internal Revenue Service also provides useful links to state information. The “charities and non-profits” section of the IRS website includes a “state links” component — a collection of links to state government sites with information on state registration requirements for charities, taxation, information for employers and more. Visit www.irs.gov/charities/index.html.

2. Select a Name

Every nonprofit corporation must have a corporate name under which it conducts its business. To avoid confusion, nonprofits — like other businesses — cannot adopt the same name as another organization.

States may also have specific requirements for creating a name. For example, in Ohio, the word “trust” cannot be used in a name unless the entity is, in fact, a formal, legal trust. Other states may require a corporation to include the words “corporation,” “incorporated,” or similar words or abbreviations in its name.

The Office of the Secretary of State can help determine whether the name chosen for the new organization is available; it may refuse to accept articles of incorporation if the land trust’s chosen name is not acceptable. A land trust should check on the availability of a chosen name as early in the process as possible so that documents or other materials do not have to be redrafted if the desired name is not available.

3. Identify Incorporators and a Board of Directors

To create a nonprofit corporation, a land trust must have individuals willing to undertake the incorporation process. They will oversee the process of drafting and filing the documents needed to establish the organization, making decisions for the land trust until this process is complete.

Once incorporated, a board of directors (also known as “trustees” or “governors” in some states) and appropriate officers will manage the land trust.

State law will govern the number of required incorporators, as well as the number of required board members and officers and how they are initially selected. Local counsel should advise a land trust on these details.

4. Draft Documents: Articles of Incorporation and Bylaws

By definition, corporate documents create and define a nonprofit corporation. The organization does not exist except



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By definition, corporate documents create and define a nonprofit corporation. The organization does not exist except through these documents, and it cannot act outside the authority given to it by them.



It is critical for a land trust to follow the statutory formalities in drafting and filing its corporate documents. Failure to follow the proper procedures may mean the land trust is not effectively established, and any business conducted by the land trust may be improper.

through these documents, and it cannot act outside the authority given to it by them.

Initially, a land trust will draft articles of incorporation (also known as a “corporate charter,” “articles of organization,” “certificate of incorporation,” or other name given under state law) and bylaws.

A land trust will create other documents over time — such as board minutes, resolutions or policies — that will further describe and direct its activities. The articles of incorporation and bylaws will guide the land trust in creating these other documents.

Articles of Incorporation

Creating a nonprofit corporation begins with drafting the articles of incorporation or the corporate charter. This corporate charter establishes the basic structure for the organization and outlines the organization’s broad purposes and powers. It quite literally creates the organization.

Each state has its own requirements for what specific information must be in the corporate charter and the bylaws. State law may also indicate areas where an organization has some discretion or choice, including whether to address certain issues in the articles or bylaws.

State law also dictates *how*, *when* and *where* an organization must file its corporate charter.

It is critical for a land trust to follow the statutory formalities in drafting and filing its corporate documents. Failure to follow the proper procedures can mean the land trust is not effectively established, and any business conducted by the land trust may be improper.

Articles of incorporation can (and in some situations must) later be amended. If any critical information in the articles changes — such as the corporate name or the registered address of the organization — the articles must be amended.

In other instances, a land trust may choose to make changes to its organization that will also require changes to the articles. For example, if the articles limit a land trust’s activities to certain identified counties and the land trust wishes to expand its service area, it will need to amend its articles. To be effective, amendments must also be properly adopted and filed.

The articles of incorporation drafting guide at the end of this chapter provides detailed information on issues to consider

when drafting articles of incorporation. In summary, articles of incorporation typically address:

- *Corporate name and legal address of the organization*
State law typically requires that this information be kept current. Land trusts that do not have a formal office or think they may frequently change offices may wish to use a formal “registered agent” to serve in that capacity. This approach avoids the need to amend the articles repeatedly should the office address change.
- *Names of initial incorporators*
This requirement identifies those individuals who have initiated the incorporation process. As noted above, state statute sets the number of required incorporators.
- *General corporate purpose, including an acknowledgment that the organization is organized and operated exclusively for charitable purposes*
While every nonprofit corporation can create its own corporate purpose, a land trust that wishes to hold tax-deductible conservation easements will need to make sure that it has stated its corporate purpose or mission in language that will meet the requirements of the federal tax code and its own state conservation easement enabling language. To meet this requirement, tax-exempt charities must also include a provision directing assets to another tax-exempt charity in the event of dissolution.
- *General corporate powers*
The general powers of a nonprofit corporation are typically spelled out by statute but some organizations reiterate their powers in their articles or bylaws.
- *Voting rights or requirements of members, if any*
This governance decision is one of the most important that a land trust must make in determining its organizational structure. While the articles of incorporation typically address this issue, some land trusts address it in their bylaws.

The IRS has also created sample articles of incorporation that are designed to meet tax code requirements. This sample document is included at the end of this chapter on page 54.



Land trusts that do not have a formal office or think they may frequently change offices may wish to use a formal “registered agent” to serve in that capacity. This practice avoids the need to amend the articles repeatedly should the office address change.

Bylaws

Corporate bylaws, discussed in detail later in this chapter, address *how* the organization will govern or manage its operations.

Like the articles of incorporation, state law will govern how land trusts draft bylaws. Unlike the articles of incorporation, the bylaws are primarily an internal document and need not be filed with the Secretary of State.

Land trusts are not typically required to make their bylaws available to the public, but many do because it demonstrates that they take their governance responsibilities seriously. The bylaws themselves may address who is entitled to access them and other corporate documents.

5. File with the Secretary of State

A land trust must file its articles of incorporation with the appropriate Office of the Secretary of State before it can begin officially conducting business. Any later amendments to this corporate charter must also be filed.

The articles of incorporation are a matter of public record. This process puts the public on notice that there is a nonprofit entity operating in the state and provides information on how to find the organization.

Details on how and when to file are available from the Office of the Secretary of State. There are filing fees associated with registering as a nonprofit corporation, and amounts vary among states.

Maintaining “Good Standing”

Once officially incorporated as a nonprofit corporation, a land trust must continue to operate in accordance with state law and provide the state with regular confirmation of its existence and operation. This procedure is referred to as “maintaining good standing.”

If a land trust is not in good standing, it may not be able to continue to conduct business in the state — such as completing conservation easements or other real estate transactions.

A land trust will need to file an annual report and pay any required fee to remain in good corporate standing. Each state determines the form and content of the required report, the timing of when filing is required, and the amount of any associated filing fees.



Maintaining good standing: The land trust continues to operate in accordance with state law and provide the state with regular confirmation of its existence and operation.

The same office that manages the initial incorporation process, typically the Office of the Secretary of State, manages the annual filing procedure. That office can provide information on the specific process a land trust must follow. The following are general guidelines:

Purpose of Annual Filing

The primary purpose of this annual reporting or registration process is to confirm that the organization is still in business and can be formally contacted, if necessary. In some states, the organization may also be asked to certify that it complies with identified applicable state law.

Process of Filing

Annual registration is typically a simple process of completing a brief form provided by the Secretary of State and paying any required fee. In many states, you can complete the annual reporting process online.

Failure to File

While the annual registration process is simple, failure to file properly can be quite serious. A land trust that fails to meet applicable annual reporting requirements may lose its “good standing” and may not be allowed to conduct business until the required reports are filed and any fees and penalties paid. In some states, repeated or extended failure to file may result in automatic dissolution of the corporation by the Secretary of State.

Filing in Another State

As a single entity, a land trust only incorporates in one state. However, some land trusts conduct business in more than one state. In that case, the land trust may need to register as a “foreign corporation” in the other states in which it intends to do business.

State law governs this process, like the incorporation and annual filing processes. Registering as a foreign corporation typically involves filing a simple application and paying a required registration fee. The land trust may also need to designate someone to act as its official “agent” within the state to accept legal documents and notices.



A land trust that fails to meet applicable annual reporting requirements may lose its “good standing” and may not be allowed to conduct business until the required reports are filed and any fees and penalties paid. In some states, repeated or extended failure to file may result in automatic dissolution of the corporation by the Secretary of State.



A land trust must consider both its fundraising and land conservation activities in determining whether it is operating in more than one state.

A land trust must have some minimum level of contact or activity in another state before it is required to register there. However, there is no definitive standard on how much business a land trust can conduct and what that minimum level constitutes. Such a determination requires an analysis of all of the facts and circumstances surrounding the land trust's programs or activities in that state. A land trust must consider both its fundraising and land conservation activities in determining whether it is operating in more than one state.

Maintaining an office, owning land or completing even a single land transaction may require registration in some states. Actively raising significant funds in a state suggests that a land trust comply with both the corporate registration laws and any state charitable solicitation registration laws, which require separate filings. (See chapter 3 for more information on state and local charitable solicitation laws.)

A land trust registered to do business as a "foreign corporation" in other states will need to complete similar annual filing requirements and pay any required fees in those states. A land trust should consult with a knowledgeable local attorney if it believes it may be conducting business in more than one state.

Keeping Track of Reporting Requirements

The Secretary of State's Office may notify corporations registered in the state when the annual report is due. However, it is every organization's responsibility to file required reports whether or not it receives such a notice. Therefore, a land trust should know what the local reporting requirements are and create its own system for keeping track of when reports are due.

Certificate of Good Standing

A land trust involved in real estate or other business transactions may be required to demonstrate that it complies with basic state nonprofit corporate laws by obtaining a certificate of good standing from the Office of the Secretary of State. That office will be able to explain the process involved, which varies from state to state. A small fee is typically charged.

In some states, the certificate of good standing is recorded in the land records as a part of a real estate transaction.

The certificate of good standing indicates only that the land trust complies with basic state corporate filing and reporting requirements at the time the certificate is issued. It is important to remember that an incorporated land trust must also comply with its own internal governing documents, as well as other laws that apply to its operations.

Using the Services of a Registered Agent

Some land trusts may find it challenging to keep up with state nonprofit corporate regulations and registration requirements.

There are companies that can assist land trusts in making sure that they comply with these types of business requirements. Some groups, such as Corporation Service Company (www.incspot.com), work nationally in all 50 states. These companies can serve as the “registered agent” for a land trust, agreeing to act as the legal agent for the organization for limited purposes, such as accepting legal service, as well as assisting with various registrations and filings. While there is a cost for these services, it may be more cost effective for a land trust to use a registered agent than to stay current on these matters by itself.

Bylaws

Bylaws are the primary internal governing document for any nonprofit corporation. They set out the basic operating procedures and decision-making structure for the organization. The following section covers:

- The purpose of bylaws
- Drafting bylaws
- Amending bylaws

Also included is an exercise land trusts can use to evaluate their bylaws. Following the exercise are a bylaws checklist and sample bylaws from land trusts around the country.

Purpose of Bylaws

All corporations, nonprofit or otherwise, can only act through individuals associated with the organization. However, as an independent entity, a nonprofit corporation has a mission and identity that transcends the views or opinions of these individuals. Decisions and actions of the organization represent the *collective* voice of those associated with the group.

A land trust's bylaws create the internal processes and rules by which the organization can act. Bylaws create the structure for how the board of directors (and members, if appropriate) will make corporate decisions and manage the organization. If a land trust wishes to allow staff or others to make certain decisions for the organization rather than the board itself, the bylaws should clearly allow the board to delegate that authority. (See also Practice 3E, Delegation of Decision-Making Authority.)

Land trusts should design their bylaws to ensure that the decisions of the corporation in fact reflect the collective opinion of the group, not the individual opinions of a few. For example, provisions addressing the size of the board, meeting quorums and term limits for individual board members prevent rule by the minority or dominance by a single individual. (See also Practice 3D, Preventing Minority Rule.)

Not all states require a nonprofit corporation to adopt bylaws. If an organization does not have its own bylaws, state law will directly govern how the organization must manage its affairs. This situation, however, requires that the organization and its board of directors are intimately familiar with state laws and regulations. The organization does not have any discretion in how the rules are written and presented.

A land trust that adopts its own bylaws must follow state law requirements but can draft the document to meet its own unique needs and circumstances. It can use this opportunity to address important structural and decision-making issues. It can incorporate language that is more meaningful to its own participants.

No one approach to creating bylaws will work for all land trusts. An organization's needs are unique and will influence the way bylaws are drafted.

Whatever internal governance process a land trust creates for itself through its bylaws, it is important for the organization to follow its own rules. Failure to comply with the established process may make decisions invalid.

Drafting Bylaws

Although constrained by state law, a nonprofit corporation typically has a great deal of discretion in deciding how it will govern itself. To draft

Different Approaches to Governance and Decision-Making

All land trust bylaws should address how organizational decisions are made. But land trusts will approach the issue differently depending upon their own circumstances.

A recently established, all-volunteer land trust may make all of its decisions through its full board of directors. As it matures, it may want to create committees to deal with some matters in-depth rather than have those matters dealt with by the board as a whole. If it hires staff, the land trust will want the staff to be responsible for some matters that the board had previously handled. And as staff members gain experience, the board may wish to add to the types of decisions that can be made by staff.

For example, most land trusts require the full board of directors to make all decisions regarding real estate transactions. More experienced land trusts with a growing level of real estate activity may wish to create a committee of the board to review transactions in detail and present them to the full board on a “consent agenda,” requiring much less discussion at that level. Larger land trusts with experienced staff may choose to delegate further authority over certain transactions to staff. Staff then reports to the board on its land transactions rather than seeking prior approval. (For more guidance, see Practice 3F, Board Approval of Land Transactions, and the Land Trust Alliance course “Land Trust Boards: Preparing for Perpetuity.”)

No one approach is right for every land trust. However, it is important for the land trust’s bylaws to provide for whatever approach the land trust prefers.

Land trusts may wish to draft their bylaws with an eye toward allowing this type of decision-making change in the future. This strategy allows the organization to adapt as needed without necessarily changing the bylaws each time a new situation arises.

effective and tailored governing documents for any land trust requires a thorough review of state law along with knowledge of current nonprofit governance practices. For more detail on board governance, see the Land Trust Alliance course, “Land Trust Boards: Preparing for Perpetuity.”

The following outlines a few basic principles to consider when creating bylaws.

General Principles

In general, a land trust should consider the following in drafting bylaws:

- *Clarity*

It is important for a land trust to draft bylaws clearly. As the primary internal governing document, all land trust board members and staff should be able to understand and comply with the provisions of the bylaws easily.

- *Consistency with state law*

Bylaws must be consistent with state law. Many states offer sample bylaws that conform to the state's requirements. Check with the Office of the Secretary of State, the Attorney General's Office or a nonprofit support center for examples.

- *Consistency with the corporate charter*

Bylaws must also be consistent with the land trust's own articles of incorporation. State law may dictate what matters must be addressed in the charter and what can be addressed in the bylaws. To include desired terms in bylaws, the corporate charter may also need to be amended.

- *Detail*

Bylaws are drafted with varying degrees of detail (see box opposite); no one approach is correct. Some land trusts prefer to draft their bylaws to meet minimum state requirements. This approach provides a basic structure for the organization, but it will leave the board to deal with many matters on a situational or policy basis. These land trusts prefer the flexibility this approach provides.

Other land trusts prefer more specific bylaws that cover a broader range of procedures and details. This approach allows the board to refer to only one document to determine how the organization deals with its most important issues. Any desired changes, however, require an amendment to the bylaws as well — often a more complicated process than changing a board policy.

In consultation with its own legal counsel, each land trust must choose the approach that it prefers and that is consistent with state law. The preferred approach may change over time as the land trust's experience and success grow or as new issues arise.



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Components

State law identifies the components required to be included in an organization's bylaws. A land trust may have options with respect to other topics.

How Much Detail in Bylaws Is Enough?

Example 1: Notice of meetings.

Local law often gives nonprofit organizations broad latitude as to how they must give notice of board meetings to directors. Some nonprofits choose to set the meeting schedule and details of how they give notice for each meeting in the bylaws. Others draft the bylaws to require only minimal legal notice of meetings but then provide actual notice as appropriate for their own circumstances.

The first approach provides great clarity but requires strict adherence to the schedule for meetings to be valid. Any change to the process requires a change in the bylaws. The second approach may be easier to implement but may result in an inconsistent process.

Example 2: Immunity for directors.

State law typically spells out in detail the immunity from personal liability provided to nonprofit board members.

Some land trusts prefer to address this protection in their own bylaws — an approach necessary if an organization wishes to provide greater than the statutory protections but not required if it prefers to follow the statutory approach. Even in the latter case, some organizations like to put such important information in a document more easily accessible to board members than state statutes might be.

Others leave this issue out of the bylaws and rely only on the statutory language, preferring to avoid any confusion that might arise if the language is not identical in each place, or changing the bylaws if state law changes.

Items often covered include (although not necessarily in this order or structure):

- Organization name
- Purposes of the corporation
- Office location and address
- Members, if any, including qualifications and voting rights
- Board of directors (or trustees or governors), including numbers, qualifications, selection and termination process, and terms of service
- Board meetings, including required quorum, time and place, and notice
- Annual meeting

- Officers, including terms of service and responsibilities
- Committees, if any
- Fiscal policies, including fiscal year and fiscal controls
- Amendment of the bylaws
- Compensation and reimbursement
- Delegation of authority to staff
- Corporate books and records

This list is not exhaustive. Local law and practice, as well as a land trust's individual preference, may dictate what other issues are addressed. A bylaws checklist included in the materials at the end of this chapter discusses these components in more detail.

Periodic Review

Land trusts and the circumstances in which they operate will inevitably change over time, which may require changes in the way a land trust organizes and governs itself.

The board of directors should:

- Review the organization's bylaws periodically to make sure the bylaws remain relevant and accurately reflect the way the organization operates
- Amend the bylaws if change is needed

How Often Is Review Required?

There is no definitive answer as to how often bylaws should be reviewed, but common options include:

- *Annual review*
You should not have to amend well-drafted bylaws every year, but an annual review provides the land trust with an ideal opportunity to remind itself of their importance and to catch any problems before they mushroom out of control. This practice also allows incoming board members and officers to become familiar with the bylaws and to point out any concerns. A fresh look at a document can often be helpful in spotting problems.
- *During major changes*
A land trust should always review its bylaws whenever it is considering major changes to its operations or undertaking any new activities or responsibilities. The land trust must ensure

that the bylaws allow the change in direction or it needs to amend them to accommodate that change.

Even if change is unneeded, periodic review of the bylaws provides a land trust with an opportunity also to review its operations to ensure they are consistent with these legal guidelines.

Who Should Review Bylaws?

While the full board (or in some cases, the membership of the organization) will ultimately need to amend the bylaws, many land trusts assign the initial responsibility for bylaw review to a governance committee of the board. That committee may want to create a schedule for periodic as well as more in-depth bylaw review.

When to Amend Bylaws

A land trust may need to amend bylaws to reflect changing conditions, which includes the following situations:

- *State laws or regulations governing nonprofit corporations change*
Bylaws may need to be amended to reflect any changes in state law. For example, several years ago, the State of Minnesota completely rewrote its statutes governing nonprofit corporations. Most provisions gave nonprofits more operating flexibility. Several provisions noted that the state law provisions would apply unless an organization chose otherwise. It was important for all nonprofits to review their bylaws and choose which provisions they wanted to follow.
- *Technological advances change the way an organization does business*
Most businesses today rely heavily on telephones (conference calls and fax) and e-mail to conduct business. Yet many nonprofit bylaws still require notice of meetings only by mail or participation in meetings only in person. If allowed by state law, a land trust may wish to update its bylaws to accommodate newer means of communication.
- *A land trust itself changes over time*
Operating principles appropriate for a young land trust may not fit years later. For example, there may be a need to expand board size or representation to reflect the expanded constituencies of a more mature organization. Term limits, if not initially in place, may become appropriate to accommodate board membership changes. Details of meeting times or committee structures, if addressed in the bylaws, may need to be amended as organizational needs change.



Even if change is unneeded, periodic review of the bylaws provides a land trust with an opportunity also to review its operations to ensure they are consistent with these legal guidelines.

Evaluating Bylaws

This exercise is suitable for instructor-led training, self-study or as an in-house exercise with your board. In evaluating bylaws (and the articles of incorporation, if necessary), the board may want to consider questions such as those listed below.

Reread your land trust's bylaws and consider the following questions. The bylaws checklist at the end of this chapter may also provide guidance in reviewing existing bylaws.

Questions for Board Bylaws Review

1. Do all board members understand the bylaws? Would the bylaws benefit from being rewritten from a grammatical or readability standpoint?
2. Are there any inconsistent provisions in the bylaws? (This is something that can easily happen when various provisions of the bylaws are amended at different times.)
3. Are there any technological problems with the bylaws? Do the bylaws reflect today's technologies (phone, fax, e-mail, etc.)?
4. Are there enough board members? Too many? Do they provide the type of representation of the community that the land trust desires? Do they all come to meetings? Is that a problem? Will a change in board structure created through the bylaws help address the issue?
5. Is the organization actually being managed the way the bylaws dictate? Are decisions being made consistently with the process identified in the bylaws? Has the process become too cumbersome? Does it distract the board from dealing with its most critical issues? Should the process be changed to accommodate any organizational changes?
6. Do the bylaws reflect the current mission and programs of the land trust?
7. Are the bylaws being constantly amended? Is more operational flexibility appropriate to avoid this situation?
8. Would an outsider understand how the land trust makes decisions? Would a major donor or foundation have confidence in the land trust's decision-making process?
9. Has state or federal law changed since the land trust last amended the bylaws?

Sample Documents and Additional Resources

A number of additional materials are included here to help you understand and draft the documents discussed in this chapter.

Articles of Incorporation Drafting Guide (page 51)

This guide identifies the topics that a nonprofit corporation's articles of incorporation or corporate charter typically address. It highlights when and why certain provisions are required, and touches upon a core issue of nonprofit governance — whether to provide for voting rights of members.

IRS Sample Articles of Incorporation (page 54)

The Internal Revenue Service has created this sample document to demonstrate the provisions *required* by federal tax law to be included in the corporate charter of a nonprofit, tax-exempt public charity. You may need to adapt it further to fit the needs of your land trust and the requirements of state law.

Bylaws Checklist (page 56)

This checklist suggests a process for land trusts to follow when writing or reviewing their bylaws. It identifies topics typically addressed in bylaws and provides suggestions on when certain provisions might be used.

You can use this checklist to guide your own process in creating or reviewing bylaws, but you may need to adapt it further to fit the needs of your land trust and the requirements of state law.

Sample Bylaws

The bylaws included here come from land trusts of different sizes, with different missions and from different regions of the country. They demonstrate a range of approaches in style and content. No one approach will be appropriate for all land trusts.

Colorado Coalition of Land Trusts (page 61)

The Colorado Coalition of Land Trusts is a statewide land trust support organization.

Little Traverse Conservancy, Michigan (page 70)

The Little Traverse Conservancy is an established regional land trust in Michigan. It has been operating for more than 30 years and now has 12 staff. The bylaws provide for a large board, and as many as 40 board members, but with only 10 required for a quorum. The members have voting rights, but only 25 (of the currently 4,000) members need to be present at a meeting for a quorum.

Lowcountry Open Land Trust, Inc., South Carolina (page 74)

Twenty years old, the Lowcountry Open Land Trust, Inc. is a regional land trust operating in nine counties in South Carolina. It has protected 168 tracts of land with a staff of seven. Its recently revised bylaws are more extensive than some, with a lengthy description of its purpose and detailed provisions on tax-exempt charity restrictions and indemnification. The land trust has a board of 17 with the executive director serving on the board without voting rights. Its 850 members have voting rights, but a quorum requires only 15 members.

Minnesota Land Trust (page 88)

The Minnesota Land Trust is a 15-year-old statewide organization with a staff of 10 and a conservation easement portfolio of more than 320 easements. It does not have voting members. It can elect 20 board members. Its executive director is the president of the organization and serves ex officio as a voting member of the board. Its bylaws are relatively brief and were recently amended to accommodate fax, e-mail, and so forth. The bylaws do not address a corporate purpose.

Rio Grande Headwaters Land Trust, Colorado (page 96)

Rio Grande Headwaters Land Trust is a relatively young Colorado organization with no full-time staff. Its bylaws provide for a board of four to nine members who are required to hold an annual retreat. There are no voting members. It has a defined geography within which it works. The bylaws have a brief discussion of purpose, which refers to the tax code and defines a service area geography.

Society for the Protection of New Hampshire Forests (page 106)

One of the oldest and largest land trusts in the country, the Forest Society has interesting bylaw provisions regarding the need for its president to be a forester and the requirement of an advisory council.

Souhegan Valley Land Trust, New Hampshire (page 113)

The Souhegan Valley Land Trust is an all-volunteer land trust that has been in existence for more than 35 years. It operates in a single county in New Hampshire. The land trust recently amended its bylaws to remove limitations on board terms. The bylaws incorporate a lengthy conflict of interest policy and a nondiscrimination policy.