
Practice 3F: Board Approval of Land Transactions

- The board reviews and approves every land and easement transaction, and the land trust provides the board with timely and adequate information prior to final approval. However, the board may delegate decision-making authority on transactions if it establishes policies defining the limits to that authority, the criteria for transactions, the procedures for managing conflicts of interest, and the timely notification of the full board of any completed transactions, and if the board periodically evaluates the effectiveness of these policies.

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

Virtually all land trusts are “incorporated” as nonprofit corporations or organizations in the state in which they operate. Consequently, each board member of the land trust—as a “nonprofit corporate board director”—holds the legal responsibility to oversee and direct the land trust’s overall business, including its land transactions. Each board member owes a legal duty of care to the land trust, essentially to act in good faith and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

To meet the legal standards established for nonprofit corporation board members, if the full board of the land trust is not going to review and approve of each and every land transaction undertaken by the trust, it needs at a minimum to set forth how land transactions will be approved and by whom. If approval authority is delegated, in whole or in part, it must be clear under what circumstances and within what limits that authority may be exercised. (See practice 3A for further discussion of board accountability and legal duties.)

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

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

- The land trust may buy a property at an excessive price, raising questions as to whether the land trust has violated U.S. Internal Revenue Code regulations prohibiting land trusts that hold Section 501(c)(3) tax exempt status—and virtually all land trusts do—from acting in ways that create “private benefits” for the seller rather than acting for the public benefit.
- Laxness or haste in undertaking a land transaction may cause the land trust to skip performing a preliminary environmental assessment of the property. Should hazardous waste exist on the property, under current federal and state hazardous waste laws, the land trust could acquire a substantial financial obligation to clean up the contaminated property.
- The types of properties being protected may serve the personal agenda of one or a few of the staff or board members, veering away from the mission or strategic plan adopted by the entire board and staff.
- Board members who are not involved in decisions on land transactions, the heart of every land trust’s work, may become uninterested, passive board members.
- The appearance that the land trust makes decisions on an ad hoc basis, or that a transaction can be pursued by influencing one key person in the land trust, may damage the land trust’s credibility in the community and raise questions about whether it is serving the community interest.
- The land trust may take on projects with stewardship obligations that exceed the organization’s capacity or financial resources, jeopardizing the financial stability of the organization.

Full board participation in transactional decision-making helps avoid such problems and serves the critical role of furthering the entire board’s understanding of and commitment to the organization’s work, minimizing the risk of bad decisions due to haste, personal preference, mistakes, or abuse.

A land trust also needs to understand that its board is responsible for other types of decisions affecting its real property holdings, including amendments to conservation easements and the transfer, sale or exchange of property held by the land trust. Board action is almost always required. (See practice 6H for a discussion of policies on transfer of real property and other assets, and 9K and 9L for sale or transfer of conservation lands.)

The discussion that follows focuses on acquisitions of land and conservation easements, the most frequent transactions in which land trusts are involved.

The Approval Process

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

Thus, a land trust makes different levels of decisions at different points in its project selection process. Early on, it makes a preliminary decision, formally or informally, to engage in negotiations. As the transaction proceeds, decision makers must review and evaluate an array of information about potential costs, benefits and risks. Decisions are made throughout to continue or withdraw from the transaction. Eventually, a final, formal action is taken to approve or disapprove the transaction.

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

Some ways that land trusts handle decision-making at the beginning, middle and end of a transaction are discussed below.

Preliminary approval

Some land trusts involve the full board at the beginning of the transaction by requiring its preliminary approval to proceed. The board's decision should be based on a determination that the project meets the first two tests in the land trust's selection criteria—that the project is consistent with the land trust's mission and goals, and that the property has significant resource and public benefit values (see practice 8B). Having the board grant preliminary, conditional approval helps the transaction process in several ways.

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

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

Approval as the transaction proceeds

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

Final approval

At this point, the land trust has determined the transaction meets its selection criteria, and all of the steps in the land trust's selection process have been completed (see standard 8 for a discussion of the selection process and criteria). Agreements and legal documents have been developed and reviewed by representatives and legal counsel of the land trust and the landowner. For most land trusts, the project is ready for final action by the full board. The basic steps for presenting, discussing and approving the project include the following:

- 1. Send advance notice and information.** Before the board meeting, board members should receive an agenda listing all projects to be discussed. The agenda should include a brief description of each transaction and recommend action or options for the board to discuss. This allows the board members to ask for more information or reflect upon the transaction ahead of time.
- 2. Provide visual depictions.** Maps and photos that adequately depict the land should be available at the meeting. In some cases an advance site visit by one or more board members is useful.
- 3. Provide a fact sheet.** A standard fact sheet or report should be completed for each property, with pertinent information about ownership goals, natural resource value, monitoring and management needs, costs, etc. The fact sheet should also include a summary of the results of the environmental assessment, a layperson's description of any title issues that exist and other issues that have come up during the process of bringing the land transaction to fruition.
- 4. Present the issues.** The committee or project manager should present key issues that need to be considered.

5. **Conduct a thorough discussion.** The board should thoroughly discuss the proposal focusing on key issues, and board members should request additional information or ask questions if needed. The decision should not be rushed.
6. **Take a recorded vote.** The board secretary should ensure that minutes reflect the final vote and the names of any dissenter(s).

A copy of the minutes approving the project or the approved resolution should be kept in the project file.

The Importance of Accurate, Sufficient Information

To make informed and responsible decisions, the board must be knowledgeable about important features of the land and the transaction. Lack of accurate, sufficient information can cause a number of problems for the land trust.

- **Decision-making can become unpredictable, tedious and frustrating.** This can lead to strained relations among board, staff and committees. It may also result in the denial of projects that should be approved or approval of projects that should be denied.
 - **Politics and personalities may rule over sound practices.** There is more room to persuade through emotion or bullying if the facts are not available.
 - **The board may fail to fulfill its legal duty of care** to conduct reasonable inquiry and make prudent decisions that further the organization's mission and the public benefit.
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Informing the Board Throughout the Transaction

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

- **Provide the board with initial notification.** All board members should be notified when the staff or lands committee starts to pursue a project. Not only is this the first logical step in keeping board members informed, it may lead to useful information, allow important issues to be raised early on or head off unpleasant surprises. For example, a board member may object to the land trust dealing with a particular person, have an interest in a property that is under consideration by the land trust, or

have information about the property or landowner that could be useful in the transaction.

- **Have the board visit the site.** Depending on the size of the land trust, its decision-making process and the particular project, it may be wise for some or all of the board members to visit the site of a project proposed for approval. In larger, staffed land trusts, the board may not play such a hands-on role.
- **Keep the board informed through regular status reports.** For most land trusts, the board should receive regular reports from the project manager or lands committee. These should be provided to the board before or at regular meetings so that they may be discussed if the board members desire. This helps keep the board informed of issues as they arise.

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

Information for Final Action

The board needs two kinds of information to make a final decision on a project: it needs to know whether all necessary steps have been completed; and it needs relevant information about the project's benefits, risks, terms, etc. Land trusts generally use one of the following two types of forms to provide this information:

- **Project checklist.** This is an outline of the required steps in the land trust's project selection process. When completed, it shows the board that all necessary steps have been taken—survey, title report, preliminary evaluation for hazardous wastes, appraisal, etc. The project manager can also use the checklist to keep track of the progress of the project.
- **Project fact sheet.** This provides the board appropriate information on the property's conservation values, legal status, protection plans, management implications, cost, etc. Land trusts use some type of project fact sheet to display this information—either a form that can be filled out by hand, or a narrative report that can be completed on a word processor. Either way, the land trust should establish standard categories of information to be completed and provided to the board.

The type and amount of information needed varies with the project. Keep in mind that particularly controversial or complex elements of projects should be investigated in more detail, and the board should be provided thorough information on items that require serious deliberation.

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

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

Having this level of information ultimately allows the board to fulfill its legal responsibilities to the nonprofit corporation it governs: the land trust.

The Role of Committees in Project Approval

In the majority of land trusts, project approval decisions are made by the full board. In some cases, however, a land trust may decide that its special circumstances make approval by the full board overly burdensome or impractical and may delegate some or all approvals to a committee or staff. This may occur, for example, in mature organizations with large boards and complex transactions, where many board members are on the board primarily to help with finances and long-range policy; in organizations that are primarily educational groups and operate a land trust arm; or in organizations that operate regionally or statewide and whose boards meet only quarterly due to distance of travel.

Most land trusts delegate at least some of the work of a transaction, and certain levels of decision-making, to one of the following types of committees:

- **Lands committee.** Many land trusts have a committee—called a lands committee, or project or acquisition committee—that, either operating alone or in tandem with an executive committee, recommends action to be taken by the board. Such a committee can allow the land trust to involve people with special expertise who are not on the board.
- **Executive committee.** Some land trusts do not have a separate lands committee, but instead assign these functions to an executive committee, in addition to its other duties.

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

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

To be effective, committees should heed the following advice:

- Committees should avoid operating as or being perceived as an “in” group that shuts out other board members from the core work of the land trust.
- Committees must not just report to the board, but need to evaluate options and make specific recommendations to the board.
- Committees need to back up their recommendations with sufficient facts and information and to convey the work, research and deliberations behind the recommendations.
- Committees should report in detail on controversial topics and be brief on routine matters.
- Committees need to give the full board the opportunity to discuss the proposed decision in detail. Board approval should not be a mere rubber-stamping of the committee's decision.

The Role of Staff and the Policy Governance Model

For those land trusts with a large professional staff and a heavy volume of annual land transactions, staff is often delegated the authority to make certain decisions on land transactions. This generally happens in one

of two ways:

- Through the **chief staff officer**, either acting through the policy governance model or through specific authority granted by the board; or
- By **land protection project staff** authorized to make decisions on specific types of transactions or those located within a defined geographical area.

Both of these approaches require careful consideration and monitoring by the board. While they change the nature of the board's participation, neither diminish the board's ultimate fiduciary responsibility for the organization, and hence, its responsibility for each individual land transaction.

Policy governance and the Carver model

An alternative form of board governance is a model developed by John Carver called "policy governance". Under policy governance, the board moves from reviewing and approving staff work to informing and "bounding" staff work through policy. Using this model, boards develop "end policies" that define specific outcomes or the difference that the organization exists to produce, and "means policies"—policies to govern how staff actually structure those projects it selects, particularly those policies that create the parameters of staff activity ("executive limitations"). The ends policies offer a structure that supports the board in charting the future strategy of the organization, and the means policies support the board's work in managing the current operations.

For a land trust, both sets of policies are vital in selecting, managing and evaluating its conservation project activity. Ends policies create the opportunity for a board to examine closely the cumulative effect of its conservation undertakings and allow the organization to articulate its conservation agenda. Staff can advance board policy in its project selection, and has a much better idea of what projects to say "no" to and why.

Executive limitations define the parameters under which the staff operates—what shall not occur or what the board has declared as unacceptable—thereby clarifying what staff can and cannot do in the design of its projects. These statements include topics ranging from financial and legal risk to community and landowner relationships. For example, the Vermont Land Trust is a large, statewide land trust and an advocate of the policy governance model. Its executive limitations include statements about private benefit, assessment of hazardous materials, compliance with regulatory and permitting issues, and evaluation of retained landowner rights. The policies are organized by legal type and cover easement and fee donations, easement and fee purchases, disposition or transfer of fee interests, plus a general policy governing all transactions.

Evaluation, with such carefully stated expectations, is nothing more than seeking an answer to the question, "Have our expectations been met?" The board, having clarified its expectations, can assess performance in that light.

The overall result of the policy governance model is a board that spends very little time on operational and project detail, and much more time on larger policy issues. For those

land trusts with an extremely high volume of projects and a large, professional staff, this approach is a valuable way of engaging the board and using its time most effectively.

More information about policy governance is available at www.carvergovernance.com. Various books, plus a pamphlet series, video, audiotape, and newsletter, are published by Jossey-Bass and are available at www.josseybass.com. Also available from Jossey-Bass is *The Policy Governance Fieldbook: Practical Lessons, Tips and Tools from the Experience of Real-World Boards*, Caroline Oliver and other policy governance practitioners, 1999.

Preauthorized project criteria

In some circumstances, land trusts may find it more expedient to authorize staff to make decisions on specific types of land transactions that meet certain board-specified criteria. For example, individual projects within a defined geographical area (e.g., a scenic highway corridor, a large wetlands complex, a localized farming community) or those that meet other criteria established by the board can be “preauthorized,” allowing staff automatically to proceed through certain predetermined levels of the transaction process without additional board involvement or approvals. Potential projects that deviate from the set of preauthorized criteria would then require further board deliberation and individual action. A number of national conservation organizations, like The Nature Conservancy and the American Farmland Trust, use such an approach on a larger scale.

Emergency Approval Procedures

Sometimes land trusts come under pressure to act on a project quickly. A landowner may wish to complete a transaction before year-end for financial reasons, the land trust may be trying to preempt the opportunity of another potential buyer or the landowner may be terminally ill. In such emergencies, there is often an impetus for the project manager, chief staff officer or board chair to commit the land trust to the transaction without the necessary board approval. Convening the entire board in time to make a decision may seem, or be, impossible.

Even in such emergencies, the board should retain ultimate approval authority. Many land trust boards do this by authorizing the executive committee to make emergency approvals of transactions. It is rare that a majority of an executive committee cannot be reached within 24 hours by phone. In fact, it is wise to look for executive committee members who can be found and be available on short notice. The land trust may put constraints on the executive committee’s approval authority—such as limiting the dollar amount to which the committee may commit the land trust and requiring completion of a preliminary evaluation for hazardous wastes. Emergency approvals by the executive committee should be reviewed and ratified by the full board at its next meeting.

Emergency procedures for approval should be reserved for true emergencies. It is exactly in such emergency situations, where information is frequently missing and deliberations are cut short, that a bad project is likely to be approved. Frequently what seems like the

crisis of the year can somehow await resolution in a month. A land trust should plan to have board meetings frequently enough that the need for emergency action is rare.

Ratification as an Alternative to Full Board Action

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

Examples of Land Trust Approval Procedures

The following excerpts describe the various approval procedures used by land trusts, each tailored to their own needs and circumstances. These are for illustration purposes only; the actual practices of these organizations may have changed.

The Conservancy for Charles County is an all-volunteer land trust in Maryland. It has a lands committee that does most of the work.

The recommendation comes through the preservation program committee to the board. The full board votes on the land protection project.

The San Juan Preservation Trust, a land trust serving the San Juan Islands of Washington State, has a staff of four employees. The board is involved throughout the transaction process, and does not delegate its approval authority to committees.

We use a “gradual” approval process: (1) The board is informed of the potential transaction. (2) The board is kept informed through ongoing updates of the status of the transaction. (3) The board gives preliminary approval to proceed based on available information. (4) The board gives final approval of the conservation easement gift. (5) A board representative signs the acceptance before recording.

The Maine Coast Heritage Trust is a statewide land trust with over 30 professional staff and three offices. The staff and the lands committee do most of the work, and know the type of projects the full board supports and encourages.

Staff presents proposed land transactions to our board's lands committee, which meets every two months. Projects are reviewed and recommendations are made, including whether or not the committee recommends approval by the full board. For emergency projects that arise quickly, staff obtains approval from our executive committee. The full board approves (or, in the case of executive committee approval, ratifies) acceptance of land or interests in land.

The Society for the Protection of New Hampshire Forests, another large, staffed organization, uses a process similar to that of the Maine Coast Heritage Trust.

The staff prepares a short project description (typically one to two pages of text plus a map) for each land protection project. Each project is presented to the lands committee at its bimonthly meeting (alternating months with full board meetings). The lands committee votes on the project and makes its recommendation to the full board. The full board votes to accept or reject the recommendation of the lands committee.

The New Jersey Natural Lands Trust, a statewide governmental land trust with three professional staff, describes how the board may direct modifications throughout the approval process.

Prior to the board meeting, the board members are mailed a land offering form for a parcel, which gives a physical description of the land offer and tells who the donors are and what land restrictions exist, if any. At the board meeting, the real estate coordinator presents the potential donation to the board and answers questions. A quorum must be present to accept the land. If the land is unacceptable according to our criteria, the board may ask the coordinator to go back to the donor and request a change or possibly ask for a monetary donation to offset management costs—particularly if the land has the possibility of a great deal of use. The donation is brought up again at the next meeting after the coordinator has negotiated further with the donor. If the land does not have the potential to meet our criteria, the board refuses the offer.

The Vermont Land Trust, another large statewide land trust, has adopted the Carver model of policy governance and describes its ratification process as follows:

Our current practice is to give the board a list and brief description of each project completed since its last meeting that comply with the executive limitations. The board ratifies this list as part of its consent agenda. Project opportunities that will likely violate a policy or push the implied boundaries of a policy are brought before the board in the early stage of the project's development. Staff presents information about the project, which of the executive limitations the project might jeopardize, and how that risk might be managed.

Links to Helpful Resources

- [Policy Governance](#) – the authoritative website for the Carver policy governance model. Policy governance is a complete theoretical foundation for the board’s governance role in business, nonprofit and government organizations.

Helpful Publications

- *The Policy Governance Fieldbook*, by Caroline Oliver (editor), Mike Conduff, Susan Edsall, Carol Gabanna, Randee Loucks, Denise Paszkiewicz, Catherine Raso, and Linda Stier, 1999. Published by Jossey-Bass, Inc. Publishers.

Examples from Land Trusts

- [Land Trust of Napa County \(CA\) – Project Summary](#)
- [Minnesota Land Trust – Preliminary Project Summary](#)
- [Society for the Protection of New Hampshire Forests – Project Description for Committee and Board Approval](#)
- Vermont Land Trust
 - [Executive Limitations \(Lands #1\): General Policy on the Acquisition and Disposition of Property Interests](#)
 - [Executive Limitations \(Lands #2\): Acquisition and Disposition of Property Interests – Easement Donations](#)
 - [Executive Limitations \(Lands #6\): Acquisition and Disposition of Property Interests – Gifts of Land](#)

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