

# Standard 4: Conflicts of Interest

*The land trust has policies and procedures to avoid or manage real or perceived conflicts of interest.*

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

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the land trust widely markets the property in a manner sufficient to ensure that the property is sold at or above fair market value and to avoid the reality or perception that the sale inappropriately benefited an insider.

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## Introduction

Land trusts have many opportunities for conflicts of interest to arise among their board members and staff—through real estate transactions, management of finances and assets, business dealings, advocacy activity, etc. The fallout for the land trust from conflicts of interest can be serious. Some, if mishandled, may result in a violation of the law, loss of tax-exempt status or a successful lawsuit against the land trust. But more probable are the potential internal and external problems that may result from conflicts of interest, or even the appearance of conflicts: financial losses; loss of credibility in the community; and a corrosive atmosphere of distrust and decaying morale among the board, chief staff officer and staff.

Potential conflicts of interest may arise in a variety of ways. Most of the following situations may arise in any land trust.

### SELF-DEALING

Self-dealing includes conflicts where a board member, staff member or other insider may financially benefit from his or her position with the trust. This is what is generally thought of, and usually is meant in legal terms, as “conflict of interest”. Examples where self-dealing could arise include:

- A land trust board or staff member, or his or her friends or family, is a party to a transaction with the land trust—for example, selling land or a conservation easement to the land trust or renting property to or from it.
- A board member holds an interest in a business that could benefit from the land trust’s work. For example, a board member may be an officer of a bank that the land trust wants to manage its endowment, or the president of a realty company that might handle resale of a land trust’s restricted lands.
- A board member renders professional services needed by the trust—legal, land planning, appraisal, financial analysis—but joins the board expecting to be compensated for doing so.

### OPPOSING LOYALTIES

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

- A board member’s potential use of knowledge learned in the course of land trust

business for his own personal or business interests—a concern particularly acute with board members who are developers, real estate agents, attorneys, or who serve on other nonprofit boards.

- A board member’s interest in taking personal advantage of an opportunity he knows would be of interest to the land trust—for example, a desire to purchase a parcel of land for sale that he believes the land trust would like to acquire.
- Employment decisions, such as a candidate for the position of chief staff officer who is a close personal friend of a board member.
- Special concessions from the land trust sought by a board member on behalf of himself or herself or others—such as restrictions in a conservation easement that are less strict than the land trust’s norm, or monitoring or enforcement practices that are lax.

#### PUBLIC OR INTERNAL PERCEPTION PROBLEMS

A board member, staff member or other insider may be in a position where his actions in professional or personal roles not associated with the land trust cause discomfort or loss of public credibility for the land trust. A public official serving on a land trust’s board may have his or her bias called into question. A staff person with the trust serving as board chair of another land-saving group may be perceived as a representative of his or her employer. These situations may not amount to actual conflicts, but they can cause public perception problems for the land trust.

The perception of a conflict of interest can often be as damaging to the land trust’s reputation as an actual conflict of interest.

Several land trusts have experienced at least the appearance of conflict of interest that produced bad publicity, absorbed substantial time of board members and staff in trying to manage the public fallout, and, in several cases, resulted in lawsuits (generally unsuccessful).

Avoiding actual and perceived conflicts of interest is not difficult for a land trust. But board members need to know the law on conflicts and need to take appropriate steps for dealing with them, as suggested in the following recommended practices.

#### Links to Helpful Publications

- [\*Standards for Charity Accountability\*, Wise Giving Alliance, Better Business Bureau, 2003.](#)
- [\*Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations\*, Independent Sector, 2004.](#)

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## Practice 4A: Dealing with Conflicts of Interest

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

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A conflict of interest arises when insiders are in a position, or perceived to be in a position, to benefit financially (or create a benefit to a family member or other organization with which they are associated) by virtue of their position within the nonprofit organization. The best way to address conflicts of interest is to understand how they may arise; make board members and others aware of the need to avoid conflicts; require board members, staff and other insiders to disclose any potential conflicts; and establish a policy for dealing with conflict problems as they arise. The IRS recommends that all nonprofits have a conflict of interest policy, and so do *Land Trust Standards and Practices*. A policy should identify who is covered by the policy, identify the types of conduct that raise conflict of interest concerns (such as a financial interest in a transaction, personal relationships that might unduly influence a land transaction or land management action, or being on the governing body of a contributor to the organization) and specify how conflicts should be disclosed and managed. Each board and staff member should have a copy of the policy.

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

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## Legal Issues in Conflicts of Interest

Land trusts almost certainly run a higher risk of suffering public relations and credibility problems from the appearance of conflicts of interest than they do of being successfully sued over an actual conflict. Thus, a land trust needs to develop procedures for dealing with conflicts that are stricter than those required by law in order to manage both actual and perceived conflicts of interest. In order to do so, of course, it needs to know the relevant law.

There are several legal issues, described here, that are pertinent to the discussion of conflicts of interest. This discussion is intended to provide land trusts and their advisors with some guidance in the legal issues that come into play, not to provide a definitive legal discussion of the topic. Each land trust should have its own counsel research its state's law on conflicts.

### **IRS prohibition on private inurement**

The Internal Revenue Code contains statutory bans against private inurement and private benefit. It specifies that for organizations exempt under [Section 501\(c\)\(3\)](#), “no part of the net income [may] inure...to the benefit of any private shareholder or individual.” With regard to conflicts of interest, it prohibits, for example, the payment of excessive compensation, such as for staff or services, and the disposition or rental of property to board members or staff at less than fair market value.

The private benefit proscription also applies to individuals who do not have a special relationship with the land trust and in theory is not restricted to situations where there is a conflict of interest. In practice, findings of inurement have usually been limited to transactions involving insiders—board members, officers and staff. (See practice 2C for further discussion of private inurement and private benefit.)

The IRS and the courts consider private inurement questions in the context of the additional requirement that the organization be “organized and operated exclusively for charitable purposes.” Land trusts must serve a public rather than a private interest. The amount of private benefit that the courts have allowed has depended on the magnitude of the private benefit in relation to the public benefit derived from the activities in question, and whether the private benefit is necessary in order to advance the organization's exempt purposes. For example, whether the payment of compensation to a board member for services rendered to the organization in another capacity constitutes a prohibited form of private inurement is generally judged by whether the payment is reasonable and necessary to carry out the organization's exempt purposes.

### **State laws prohibiting or restricting loans**

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

market interest rates.

### **State statutes on conflicts of interest**

Some state nonprofit laws have specific provisions dealing with conflicts of interest. The land trust's counsel should be thoroughly familiar with the relevant state statute. The generalized discussion provided here should be helpful for land trusts operating in states without such laws. The requirements and standards drawn from the statutes that do exist provide useful guidance for practical handling of conflicts.

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

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

### **Duty of loyalty**

The basic fiduciary duty of loyalty requires a board member to have an undivided allegiance to the organization's mission. It bars a board member from using his position or information concerning the organization or its property to secure a pecuniary benefit for himself. Pursuing the financial interest of a third person—even if that third "person" is another charitable organization—also may violate the board member's fiduciary duty. Most of the court cases that have arisen on account of alleged violations of the duty of loyalty deal with property transactions, investment or use of corporate assets to promote personal businesses of board members or those of related third parties, and appropriation for personal gain of opportunities suitable for the organization. The prototypical violation arises when an opportunity presents itself—such as the purchase of real estate that would further the organization's goals—and a board member or officer takes advantage of his position to appropriate that opportunity for himself, usually by virtue of superior access to information.

Although the proper disclosure of the existence and nature of such a conflict and the authorization by a disinterested decision maker acting for the organization can mitigate these constraints, the board member must, at all times, put the organization's interests

ahead of his or her own. If an opportunity related to the organization's mission comes to a board member—*whether in his or her capacity as a board member or otherwise*—the board member must make it available to the organization before he/she pursues it himself/herself or suggests its pursuit to a third party.

(Much of the discussion of conflict statutes and the duty of loyalty is drawn from *Board Liability*, by Daniel L. Kurtz, 1988. Published by Moyer Bell Limited.)

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## **Avoiding Conflicts: Screening Board Candidates**

The surest safeguard against conflicts of interest would be to keep off the board anyone who has potential conflict problems. This is rarely a practical option. Those who serve on land trust boards tend to be active, influential people who are involved in the community in a variety of ways, and thus have many crosscutting loyalties. Nevertheless, the land trust probably should exclude people with extreme conflicts—the mother of the chief staff officer, planning commission members if the land trust is actively involved in land use planning, maybe the major real estate agent in the area dealing with undeveloped land. Cyril Houle, in *Governing Boards* (1997, Jossey-Bass, Inc., Publishers), notes, “Appointments involving extreme cases of potential conflict have sometimes worked out well, but it is usually prudent to assume that they will not.” Aside from causing potential legal problems and internal tensions, there are serious practical difficulties with board members with extreme conflicts. They may have to refrain from participating in discussions and voting to such an extent that they cannot function effectively.

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## **Developing a Conflict of Interest Policy**

*Land Trust Standards and Practices* recommends that every land trust develop a written policy for dealing with conflicts of interest. Handling conflicts on an ad hoc basis can be extremely difficult. It tends to personalize decisions and either inhibit a frank exchange of views among board members or alienate them. It leaves open the possibility that the land trust will not adequately deal with a potential conflict, which could result in illegal actions and leave the land trust open to public criticism. The board can decide on a case-by-case basis what constitutes a conflict of interest. But it needs a sufficiently clear way to handle potential conflicts, one that is understood by all board members.

A conflict of interest policy can be relatively simple and straightforward and need not be a burden on the trust's operations. A policy should at a minimum reflect the standards of state law, and should be reviewed by legal counsel to be sure the policy meets all applicable legal requirements. A conflict of interest policy should include the following standard elements:

- **Disclosure.** The policy should require disclosure by board members, officers, staff, and other insiders of any real or apparent conflicts.
- **Recusal from vote, and generally from discussion.** Recusal may be beyond the requirements of law, but is so common and advisable as virtually to be required for sound operations. As Daniel Kurtz notes in *Board Liability*:

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

- **Fairness to the land trust.** For any transaction involving financial arrangements, the policy should require that the arrangement be fair to the land trust. Procedures range from formal, competitive bidding on major contracts to comparison-shopping by obtaining informal price quotations for common goods and services. If placement of investments is an issue, the land trust should consider having the investments handled by an unrelated outside manager. The land trust should have a disinterested party represent it in negotiating the terms of and implementing any transaction where a conflict is present. The land trust should certainly consider adopting the standard in California law, which requires a finding by the board that a more advantageous arrangement could not have been obtained with reasonable effort under the circumstances.
- **Explanation and enforcement of the policy.** In the induction of new board members, the policies dealing with possible conflicts of interest should be explained, as should the expectation of full disclosure, withdrawal from discussion or decision making on sensitive subjects, etc. It is a good practice to have every board and staff member sign the policy. Some organizations also have a standard process of annual notification and opportunity for disclosure, which helps remind board members, staff members and other insiders of the policy and their responsibilities under it.
- **Written documentation.** In addition to the written disclosures provided above, the land trust should document the actions it takes to manage a conflict of interest. The board minutes should reflect if there was a potential conflict and how it was addressed. A few land trusts use a practice of asking if there is a conflict of interest before every board vote and document the absence of conflict in the minutes.

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

It may sometimes happen, despite these safeguards, that a trustee appears to be putting a private interest ahead of that of the institution. If the offense is not very serious, it may be handled by a casual comment (“Jack, be sure you don’t tell your brother what we’ve decided”) that lets the possibly errant trustee know that

he is being watched. If the problem has greater magnitude, serious measures will need to be taken, all the way to a request for a formal inquiry into what is going on. Such drastic measures are never pleasant, ending, as they can, in lifelong enmity; but those who let matters ride may well find themselves in a courtroom facing the charge that they have been negligent in carrying out the duties entrusted to them.

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## Using Common Sense

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

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## Links to Other LTA Resources

- [Land Trust Alliance – Conflict of Interest Policy](#)

## Links to More Helpful Resources

- [Internal Revenue Code Section 501\(c\)\(3\)](#)
- [Internal Revenue Code Section 507\(d\)\(2\)](#)
- [Internal Revenue Code Section 4958](#)

## Helpful Publications

- *Board Liability: Guide for Nonprofit Directors*, by Daniel L. Kurtz, 1988. Published by Moyer Bell Limited.
- *Governing Boards: Their Nature and Nurture*, Cyril O. Houle, 1997. Published by Jossey-Bass, Inc., Publishers.

## Sample Land Trust Policies

- [Barrington Hills Conservation Trust \(IL\) – Policy Regarding Board of Trustee Conflict of Interest](#)

- [Chelan-Douglas Land Trust \(WA\) – Conflicts of Interest Policy](#)
- [Connemara Conservancy Foundation \(TX\) – Board of Trustees Conflict of Interest Policy](#)
- [Estes Valley Land Trust \(CO\) – Policy Re: Unsolicited Gifts](#)
- [Forever Wild Land Trust \(fictitious land trust\) – Conflict of Interest Policy](#)
- [Jo Daviess Conservation Foundation \(IL\) – Code of Ethics](#)
- [Marin Agricultural Land Trust \(CA\) – Policy Re: Board of Directors Conflict of Interest](#)
- [New Jersey Conservation Foundation – Statement of Board Members’ Individual and Collective Responsibilities](#)
- [River Fields, Inc. \(KY\) – Policies Governing Conflict of Interest and Confidentiality](#)
- [Sudbury Valley Trustees \(MA\) – Code of Ethics and Standards of Service for Board Members](#)
- [The Nature Conservancy – Conflict of Interest](#)
- [Vermont Land Trust – Personnel Policy Addendum: Conflict of Interest Policy](#)

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***To Fully Implement this Practice, LTA Recommends...***

- ❑ A land trust has a written conflict of interest policy that is followed.
- ❑ All board members and staff members have a copy of the policy.
- ❑ The policy requires disclosure of potential conflicts, includes a prohibition on conflicted parties discussing or voting on the issue and requires written documentation of each conflict.

## Practice 4B: Board Compensation

- Board members do not serve for personal financial interest and are not compensated except for reimbursement of expenses and, in limited circumstances, for professional services that would otherwise be contracted out. Any compensation must be in compliance with charitable trust laws. The board's presiding officer and treasurer are never compensated for professional services.
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People serve on land trust boards as volunteers in a spirit of civic-minded service, contributing their time, talents and funds as they are able. Board members should not serve for any personal financial interest, or the interest of any firm or organization they may represent. While board members may be reimbursed for expenses (such as travel and lodging) incurred in attending board meetings and carrying out the land trust's business, additional direct compensation for land trust board members is virtually unheard of and is restricted by law in some states. Compensation of board members, either directly or indirectly via payment for services or contracts, leads to the risk that decisions will be made that are more in the interest of the compensated party than in the public interests the organization was established to serve. Direct or indirect compensation may also be construed as private inurement. This can jeopardize the land trust's tax-exempt status. In limited circumstances when the organization is seeking services that might be contracted out, a board member may be considered as a paid provider of these services. In these cases, the conflict of interest policy and policies on fiscal controls (such as bid requirements) should be carefully adhered to. Services provided by a board member should be offered at or below market rate and must not be in conflict with charitable trust or other laws. In all cases of providing compensation to a board member, the credibility of the land trust must be considered. The guidelines for charity accountability suggest that the board chair and the treasurer not be compensated for services either directly or indirectly and *Land Trust Standards and Practices* follows suit.

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### **Possible Exception for Chief Staff Officers**

A few organizations have given the status of member of the board of directors to the paid chief staff officer (usually called the executive director), as a way of recognizing a peer relationship. Nevertheless, it may not be advisable, and certainly is not common practice, to have the chief staff officer serve on the board. Some feel that a staff head who is on the board is likely to exercise controls that should more properly be the board's. It may also be difficult for the board to review the chief staff officer's performance, set salary or consider dismissal if necessary. On the other hand, placing the chief staff officer on the board may help create an atmosphere of equal partners working toward a common goal.

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## Reimbursement of Expenses

It is acceptable, and generally sound practice, to reimburse board members for expenses, such as travel, lodging and daycare arrangements, incurred in attending board meetings and carrying out the land trust's business. This makes it possible for organizations to recruit the most qualified board members, regardless of their financial means. Board members who are able and willing not to take reimbursement may consider their out-of-pocket expenses in the course of board service to be charitable contributions.

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## Board Members Paid to Render Professional Services

Land trusts frequently have board members—such as attorneys, landscape architects, financial planners, accountants, marketing or public relations specialists—who are asked to join the board in part so the land trust can benefit from their professional expertise. Such professionals can and should provide the organization with general advice in their areas of expertise, raise important issues that might otherwise go unrecognized, provide leads and information, and so forth.

Difficult questions arise, however, when the land trust wants to hire a board member to provide the trust with professional services, rendered as a consultant or part-time staff person. If the trust pays the board member for such services, it raises legal and public relations issues. Whether the board member is paid or not, the trust must consider whether hiring board members to do work for the land trust is good business practice.

The [Wise Giving Alliance](#) recommends “not more than one or 10% (whichever is greater) directly or indirectly compensated person(s) serving as voting member(s) of the board. Compensated members shall not serve as the board's chair or treasurer.” *Land Trust Standards and Practices* prohibits chair and treasurer compensation.

### Disadvantages of retaining board members

Most nonprofit experts advise against having a board member perform professional activities—even on a voluntary basis—for which he would normally be paid. The dangers of hiring board members are many.

- Board members may find it difficult to appraise a business contract or generally to monitor professional services if they are reviewing the work of a fellow board member.
- The chief staff officer may find it awkward to review the performance of a professional service with a board member who has a special interest in it, since the board member can also influence the board's evaluation of the chief staff officer's performance.

- If unpaid, the “working” board member, like any unpaid consultant, may not give the time, attention and priority to the land trust’s work as he or she would give to other clients. Or such a board member may feel he deserves special consideration for the free work provided to the organization.
- The board may find it difficult to “fire” board members from their “jobs” if the work is unsatisfactory.
- It may lead to a perception in the community that there is self-dealing within the land trust board, that the land trust only does business with insiders or that the land trust is simply a tax-exempt arm of a board member’s business.
- In certain cases, it could lead to private inurement.

Perhaps most important, it may be difficult for all involved to distinguish the board member in his/her consulting role from his/her fiduciary (board member) role. This may cause the consulting board member to take on greater decision-making responsibility than is appropriate, subsuming the responsibility of the full board. And it may be very difficult for the board to treat the board member one minute as a peer decision maker and the next minute as a consultant, whose recommendations should be objectively evaluated the same way as any other expert the board might hire.

#### **Arrangements for retaining board members**

In spite of these difficulties, some land trusts use the professional services of some of their board members. Sometimes the professional expertise a land trust would like to have both on its board and in its work is available from only one person. Sometimes those who are willing to provide services below cost are found only among the highly committed members of the board. Sometimes the land trust may feel that a board member knows the land trust’s needs and work better than an outsider, or may feel most confident in the quality of his or her work.

The land trust and the board member should be very careful entering into such a relationship. When asking professionals to join the board, the land trust’s expectations should be clear. Some attorneys, for example, feel it would be too uncomfortable or too fraught with conflicts for them to serve on a land trust’s board and render it legal services, and prefer to serve the land trust solely in their professional capacity. When a board member is to perform services for the trust, all parties should try to be as clear as possible about the work to be performed and the expectations on both sides.

Many nonprofit organizations avoid or absolutely prohibit paying board members for services. If a land trust decides that it really is in the best interest of the land trust’s work to use the services of a board member, paying for those services has some advantages. The nature of the relationship is clearer, the terms are normally put in writing, and the burden on the board member to deliver timely and quality service to the land trust is clearer than if the work is pro bono.

Paying a board member for services raises questions of private inurement under the Internal Revenue Code and self-dealing or conflict of interest issues under state law, as discussed in practice 4A. The land trust should investigate the standards established by the statutes and legal decisions of its own state. The land trust also needs to make the decision in an open, deliberative process so it can defend itself against any public criticism. In general, the land trust should:

- **Be sure that the payment is reasonable.** The requirement in California's nonprofit law provides a good standard: that a more advantageous arrangement could not have been obtained with reasonable effort under the circumstances. Getting other bids or quotes on the same work or investigating hourly or daily rates for similar service can provide such information.
- **Be sure that the work in question furthers the organization's purposes as stated in its charter.**
- **Follow all land trust procedures,** such as land trust requirements for bids and contracts.
- **Have a written agreement** outlining the term, compensation and required deliverables, which is distributed to all board members.
- **Approve the hiring by a vote of the full board,** without the presence of the affected board member.

Under federal law, if a board member receives compensation in excess of fair market value, that board member and any organization leaders involved in approving the compensation may be subject to financial penalties. However, the compensation will be presumed by the IRS to be reasonable if: (1) it is approved by the board or a board committee in the compensated board member's absence; (2) the decision on the amount of compensation is based on reliable information about the fair market value rate for such services; and (3) the board or board committee documents the decision and basis for the amount of compensation in the minutes. This does not provide a guarantee against penalties because the IRS still can bring in data to show the compensation was not reasonable, but it does provide a measure of safety.

If the land trust finds itself using the services of a board member repeatedly, and the board member and the trust feel he or she can best serve the land trust in a professional capacity, then, absent compelling countervailing considerations, that board member should resign. He or she may be able to serve the land trust in some other capacity.

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## Links to Helpful Resources

- [Wise Giving Alliance](#) – part of the Better Business Bureau. The Alliance reports on nationally soliciting charitable organizations that are the subject of donor inquiries.

## Practice 4C: Transactions with Insiders

- When engaging in land and easement transactions with insiders (see definitions), the land trust: follows its conflict of interest policy; documents that the project meets the land trust's mission; follows all transaction policies and procedures; and ensures that there is no private inurement or impermissible private benefit. For purchases and sales of property to insiders, the land trust obtains a qualified independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real estate experience. When selling property to insiders, the land trust widely markets the property in a manner sufficient to ensure that the property is sold at or above fair market value and to avoid the reality or perception that the sale inappropriately benefited an insider.
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This practice on buying from, selling to and accepting donations of land from board members, employees and other insiders was added to respond to land trusts' requests for guidance relative to these types of transactions. While some land trusts avoid selling to or buying from board and staff members, others want to be able to engage these parties in transactions related to their mission. This practice will help land trusts avoid real and perceived conflicts of interest with regard to these transactions.

In order to ensure that the land trust's interests are being protected, the land trust should verify purchase or sales prices with an independent appraisal provided to the land trust. A land trust should not rely on the seller's appraisal. When a land trust is selling land, and an insider may be interested in purchasing the land, the property should be marketed widely to prospective conservation buyers through web pages, personal contacts, mailings, and listings in newsletters and other publications.

With regard to donations of land, board members or staff may wish to demonstrate their commitment to the land trust's mission by donating or restricting their own land, advancing the land protection goals of the land trust. In these circumstances, the land trust should follow its conflict of interest policy, ensure that the potentially conflicted party is not part of the discussions relative to the acceptance of the donation or future stewardship of the easement, and keep thorough records so that the transaction is transparent and upholds the organization's credibility. All of the land trust's standard practices on reviewing projects against acceptance criteria, doing site inspections and other acquisition procedures should be followed closely.

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## How Land Trusts Approach Transactions with Board Members

Different organizations approach potential land and easement transactions with board members differently. Some land trusts, like the Vermont Land Trust, enter into transactions with board members only after following a carefully proscribed procedure. The procedure includes the preparation of a disclosure statement that describes the following:

- The nature of the transaction;
- Its public conservation benefit and whether the parcel meets VLT's selection criteria;
- If a conservation easement, any significant variation in the easement's terms from VLT's base documents;
- Any significant variation in the income or expense budget of the project, especially of those expenses typically underwritten by the landowner; and
- If a purchase, substantiation that VLT is not paying more than fair market value for the property interest.

Other land trusts, including the Society for the Protection of New Hampshire Forests, do not as a practice enter into transactions with current board members. Consistent with state law, SPNHF's policy reads as follows:

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

Should an existing board member want to donate land or an easement, SPNHF's conflict of interest policy stipulates that the board member cannot participate in any discussion of the project and cannot be present when it is voted upon. In addition, the policy requires a two-thirds vote of the board to approve the transaction, and the board must document that the project is "fair and benefits SPNHF and its objectives."

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## Links to Other LTA Resources

- ["Law Update: New Penalties Imposed on Private Inurement Transactions", \*Exchange\*, Winter 1997 \(Vol. 16 No. 1\)](#)

## Sample Land Trust Policies

- [The Nature Conservancy](#)  
[Sales To Or From Related Parties](#)  
[Tax Deductions for Contributions of Land by Members of the Board of Governors](#)
- [Vermont Land Trust – Transactions with “Insiders”](#)

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° This material is designed to provide accurate, authoritative information in regard to the subject matter covered. It is provided with the understanding that the Land Trust Alliance is not engaged in rendering legal, accounting, or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought. Revised 11/08