

**A13. Real Estate Fundamentals: A
Primer for New Land Trust Staff**

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Real Estate Fundamentals: A Primer for New Land Trust Staff

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I. OPERATING PHILOSOPHY: Land trusts do good work but what we do is complicated. There is absolutely no reason why a land trust should treat real estate transactions any less carefully than the "for profit" world and at least one major reason why land trusts should be even more careful. Land trusts are making permanent commitments to protect a property and, therefore, need to "plan for perpetuity." The "for profit" sector has a much shorter time frame in mind and its risks are accordingly less.

II. LAND TRUST STANDARDS AND PRACTICES

Standard 9: Ensuring Sound Transactions: *Land trusts work diligently to see that every land and conservation easement transaction is legally, ethically and technically sound.*

Practice A: Legal Review and Technical Expertise

1. Obtain a legal review of every land and conservation easement transaction, appropriate to its complexity, by an attorney experienced in real estate law

2. As dictated by the project, secure appropriate technical expertise, such as in financial, real estate, tax, scientific and land and water management matters

III. "TEN RULES TO CONSERVE BY": Basic operating principles for real estate transactions:

- Rule No. 1: Always obtain a title report!
- Rule No. 2: Never assume anything!
- Rule No. 3: Always see the entire property.
- Rule No. 4: Always read the documents.
- Rule No. 5: Always do some environmental due diligence.
- Rule No. 6: Get everything in writing!
- Rule No. 7: Use your forms whenever possible.

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- Rule No. 8: Keep things as simple as possible – but recognize that may not be very simple at all.
- Rule No. 9: Record deeds and conservation easements immediately.
- Rule No. 10: Retain and use an experienced, qualified lawyer.
- Rule No. 11: Pay attention . . . to the big picture and all the little details.

IV. "THE BUNDLE OF RIGHTS" CONCEPT: Real property is a "bundle of rights" and portions of the bundle (*e.g.*, possession, development rights, mineral rights, etc.) can be owned at any time by one or more people. So, when acquiring anything related to property, ask yourself the following questions:

- What portion of the bundle of rights do we want – or need – to acquire?
- Can we describe that portion?
- Who owns that portion of the bundle of rights?
- Who has any claim to that portion?
- What do we need to do and what paperwork do we need to acquire it?

V. WHAT IS THE PROPERTY?

- A. Need for accurate legal description: from owners' deed, survey, tax map.
- B. Don't rely -- except in the very early stages -- on informal descriptions like "the old Swartz farm"
- C. Understand what the legal description involves.
 1. Lot and block "per plat" -- in more suburban settings; obtain copy of recorded plat
 2. Township and range system; "squares"
 3. Metes and bounds; courses and distances: understand methodology involved; be able to draw it (using commercially available programs for mapping or, failing anything else, buying graph paper, a protractor and an engineer's scale); description must "close"
- D. Surveys: particularly if the boundaries are uncertain or if you are carving out a piece of a large parcel.
- E. Expanding role of GPS systems: not a substitute for formal surveys but can be useful for defining building envelopes or similar areas.

- F. Access rights: legal right to reach the property should be considered part of what the property is; make sure you acquire it as well.

VI. WHO OWNS – OR HAS A CLAIM TO – THE PROPERTY (OR AT LEAST THAT PORTION OF THE BUNDLE OF RIGHTS YOU WANT TO ACQUIRE)?

- A. The "common-sensical" owner: the person with whom you have initial discussions.

- B. Ownership issues:

1. Individual – simplest
2. Trusts (including revocable living trusts and irrevocable trusts): increasingly common; title actually held by trust in the name of the trust or trustee for benefit of the beneficiaries of the trust, not individual “settlor” who created the trust even though they may be same person; beneficiary may also need to consent to transfer; a “no consideration” or charitable donation may not be possible under trust instrument; income tax issues for different types of trusts
3. Corporations, partnerships, limited partnerships, limited liability companies (LLCs), limited liability partnerships (LLPs): generally owned by entity itself which acts through authorized officers; need to review organizational documents to understand business structure and authorized signatories.
 - Be mindful of issues associated with “syndications” or “monetized” conservation transactions that can involve LLCs.
4. Joint ownership (joint tenancy with right of survivorship, tenancy in common, tenancy by the entirety): technical differences are less relevant as *all* co-owners must sign on to contract, deed, or conservation easement; partition of property may be an option; possible action for “waste”
5. Life estates: you can only receive property rights that the life tenant has; once that person dies, the estate ends regardless of when that occurs and who actually is in possession of the property; determine who is the “measuring life”

- C. Other interests in the property:

1. Conservation easements: owner may give multiple and/or successive conservation easements on the same property
2. Mortgages and deeds of trust: need for pay-off and release, or, for conservation easements, subordination; otherwise, foreclosure of mortgage can wipe out land trust’s interest in property, including a conservation easement
3. Leases and tenants; licenses: are you taking property subject to rights of others to use the property (*e.g.*, hunting and fishing rights, grazing rights); may be short to long-term
4. Other easements: utility rights-of-way; roads; driveways

5. Restrictive covenants: private use restrictions; ability to modify or terminate; questions of practical enforceability;
6. Mineral rights: associated surface access rights; IRS implications for conservation easements; rights of holders of minority interests
7. Water rights
8. Monetary claims: unpaid property taxes (which may have statutory priority over even previously acquired interests); special benefit assessments; mechanics' liens (which may relate back to date of work performed); unpaid judgments
9. Lis pendens

REMEMBER: The presence of a lien or encumbrance does not mean that you cannot or should not proceed. The lien or encumbrance may be correctible (e.g. you may be able to repurchase severed mineral rights) or not pose a problem with protecting the property.

- D. Marketable title statutes (or equivalent in limited situations such as old unreleased mortgage) may provide cut-off dates for the enforceability of certain liens and encumbrances.
- E. Always visit the property – when you can see the ground. You may see evidence of encroachments, boundary problems, people, or uses that are inconsistent with your understanding of the property's size, condition, or ownership.
- F. Always get a title report! That will tell you who actually owns the property and who (because of mortgages, liens, leases, etc.) own portions of the bundle of rights. In general, getting a title report earlier is better than later as it may prevent you from spending resources on property that cannot be obtained or protected at all or that can only be obtained or protected after a more extensive or costly process.

VII. ENVIRONMENTAL DUE DILIGENCE

- A. The downside can be very serious and strict liability is possible: some federal and state environmental laws impose strict liability upon owners and operators of property to clean up environmental contamination.
- B. “All appropriate inquiry” is the buzzword for the standard of review.
- C. Innocent Property Owner or Bona Fide Prospective Purchaser defenses may be available:
 1. May be available if land trust proceeds reasonably in investigating property.
 2. Reasonableness of investigation depends on many factors.
- D. Environmental investigations:
 1. Your own on-site inspection may show evidence of on-site (or nearby off-site) contamination (e.g., spills, waste drums, storage tanks)
 2. Environmental database searches -- an absolute minimum in all cases

3. Phase I environmental studies -- for any title acquisition -- now the standard for “all appropriate inquiry” due diligence under recent EPA regulations. Specific requirements and time period apply.
4. Phase II environmental work -- for identified problems
5. Use of in-house staff vs. environmental contractors:
 - a. Do you have the in-house expertise?
 - b. Indemnification opportunities when using outside contractors.
 - c. Would a commercial purchaser use outside contractor?

VIII. HOW DOES THE LAND TRUST ACQUIRE WHAT IT WANTS?

A. General considerations:

1. Statute of Frauds requires deeds, agreements, and documents affecting real estate to be in writing and signed by the person you want to be able to enforce it against. That means the correct owner and *all* owners must sign.
2. Rule Against Perpetuities – the 21 Year Rule:
 - a. Be cautious of any transaction that *might* not close in less than 21 years.
 - b. Example of saving clause: *“The foregoing right of first refusal shall apply only to situations where the Trust receives notice from the Owners in accordance with the above procedure of their intent to sell or transfer the Property during the period from the date hereof until the date that is twenty (20) years, nine (9) months after the death of the last to die of the lineal descendants, in being as of the date hereof, of Owners, or either of them.”*
3. Recording statutes: notice and rights of bona fide purchasers

B. Tying it up in the short term: options and rights of first refusal

1. Necessity of "consideration" to make rights you receive enforceable; preference for real monetary consideration.
2. Necessity of recording
3. Contrast with letter of intent
 - a. Intentionally grants no legally enforceable rights.
 - b. Sample language: *“Please note that this letter is intended only to set out in general terms our intentions with regard to your generous donation of*

your property. It is not intended to obligate you to make that donation nor is it a binding contract with regard to the proposed donation and it should not be interpreted by anyone as such a contract. While we fully intend to continue the process and hope that you feel the same, we each remain free to stop the process at any time we choose to do so.”

4. Pledges and escrowed closings
- C. Purchase contracts
1. Formalities: in writing, correct parties, correct property, signatures
 2. Other terms: restrictive covenants, right of re-sale
 3. Contingency periods, inspections, and due diligence: for environmental and title problems
 4. Purchase price: Is it reasonable? Do you need to have an appraisal?
- D. Closing:
1. Deeds
 - a. Types: general warranty, special warranty, quitclaim, fiduciary; significant regional statutory and terminology variations
 - b. Formalities: names of parties, property description, interest conveyed, other restrictions, signed, acknowledged
 2. Settlement statements or HUD-1s
 3. Title commitments; preliminary title reports; title insurance
 4. Recording -- IMMEDIATELY -- is absolute requirement: notice and bona fide purchaser issues

IX. OTHER CONSIDERATIONS

- A. Real estate brokers, agents, and commissions; “procuring cause”
- B. Improvements: habitability concerns, conformity with zoning, setbacks, asbestos, Americans With Disabilities Act (ADA) considerations, fire suppression and sprinklers
- C. Zoning and subdivision regulations: particularly if the property is to be resold or actively used
- D. Eminent domain: available to acquire (“condemn”) private interests in land, including conservation easements, for public purposes; attractiveness of large, undeveloped tracts for public projects; valuation and just compensation considerations; some protection from co-holding conservation easement with state agency.

X. A POSTSCRIPT: WORKING EFFECTIVELY – AND ECONOMICALLY – WITH LAWYERS

- A. Your lawyer is not your enemy! Consult with them early and often. This particularly applies to in-house counsel.
- B. Have your attorney prepare good forms -- and carefully review forms prepared by others.
- C. Use your forms whenever possible and to the maximum extent possible.
- D. Have your attorney review major changes to your forms or other party's documents you are asked to use.
- E. Don't expect your attorney, particularly outside counsel, to approve the entire conservation transaction, including the conservation values involved or other "business" issues. They probably do not have enough facts and you may not want to pay them to learn.

A PRACTICAL GLOSSARY OF REAL ESTATE TERMS

***CAUTIONARY NOTE:** These are intended as simplified, practical, and working definitions of the terms used. Unfortunately, the underlying concepts can be complicated and their application, and even terminology, may vary by jurisdiction or locale. Participants should always consult with their own attorney about specific issues.*

"bundle of rights" -- shorthand for all attributes of property ownership. Sometimes referred to as the "bundle of sticks."

"cloud on title" -- any lien or encumbrance that calls into question the ownership of property

adverse possession -- the right of a person who possesses real property under certain conditions for long enough to acquire title to it

bona fide purchaser for value -- someone who purchases property in good faith, without notice of a title problem, and for valuable consideration

boundaries -- the corners and sides of a property

condemnation -- a governmental or quasi-governmental organization's acquisition of property by eminent domain without the voluntary consent of the owner

conservation easement -- permanent legal restrictions on the use of real property

constructive notice -- notice that is implied by law as the information could and should have been discovered; a person may have constructive notice of a fact without actually knowing it

contract -- two or more parties agreeing to do something; may not need to be in writing for a real estate project

courses and distances -- same as metes and bounds

deed of trust -- essentially the same as a mortgage

due diligence -- shorthand term for the investigation of a property's title and condition that should precede acquiring an interest in it

easement -- the right of one party to use the land of another for some purpose

easement appurtenant -- generally an easement that benefits a particular piece of property

easement by necessity -- easement deemed by law to be granted when a person transfers part of adjacent property so that the person receiving the property can have access to it; avoids land locking property; similar to an implied easement

easement in gross -- and easement that is not appurtenant to a particular parcel of land

eminent domain -- the right of government and certain quasi-governmental organizations (*e.g.*, utilities) to acquire private property for public purposes even against the owner's wishes; requires the payment of just compensation

encumbrances -- anything that negatively affects a person's ownership of property

environmental database search -- review of federal, state, and sometimes local databases to determine if environmental problems have been reported on or near property

fee simple -- absolute ownership of property with the ability to dispose of it

fiduciary deed -- deed from trustee or estate executor/executrix or personal representative and contains the grantor's promise to defend title to the property against claims based upon things the grantor has done in his/her fiduciary capacity.

foreclosure -- the enforcement of a mortgage or lien by the forced sale of property

front foot benefit charge -- a charge against property to pay for certain public improvements that benefit it, such as roads or sidewalks. Often assessed on a "per foot" basis, such as per foot of frontage

general warranty deed -- deed that contains the grantor's promise to defend title to the property against claims by anyone

HUD 1 -- a settlement statement

implied easement -- easement deemed by law to be granted when a person transfers part of adjacent property so that the person receiving the property can reasonably use it

joint tenancy with right of survivorship -- form of ownership where, at the death of one co-owner, that person's interest passes to the survivor

judgment -- court order to pay money; judgments usually constitute a lien on property

just compensation -- payment for property interests acquired by eminent domain; typically based on fair market value

lease -- usually short-term transfer of the right to occupy and use property

letter of intent -- writing set forth the general terms of a transaction but specifically not intended to be a binding contract

lien -- legal restriction on or claim against property, usually to enforce some form of monetary obligation

life estate -- type of ownership limited to a person's (usually but not necessarily the life tenant's) life; life estate *pur autre vie* is measured by the life of a third party

lis pendens -- any court action that affects title to property

marketable title statutes -- statutes that impose time limits on the enforceability of different types of liens and encumbrances; intended to make property more easily transferable

mechanic's lien -- lien to secure the payment for service performed on or which benefited the property

metes and bounds -- the boundaries of property expressed as a series of points and connecting lines

mineral rights -- right to take minerals from or under land

mortgage -- voluntary encumbrance on property to secure the payment of a debt

option -- absolute right to purchase property based on specified terms; holder of option generally determines when the property will be transferred

personal property -- anything owned that is not real property

Phase I environmental report -- a review of the environmental condition of property including a site visit in addition to an environmental database report

plat -- map showing land subdivided into lots or parcels with dimensions and acreage of each shown

preemptive right -- same as right of first refusal

prescriptive easement -- essentially the acquisition of an easement by adverse possession, in other words, by continuous use under certain conditions for a prescribed period of time

property taxes -- taxes that constitute a lien on property until paid; usually assessed based on a property's value

quiet title action -- a lawsuit to resolve a dispute regarding the ownership of property

quitclaim deed -- deed that conveys only what interest the donor has and makes no promise of what that is

recording -- act of having a copy of a deed, conservation easement, or similar document included in the public record; puts other parties on notice of the transaction

real property -- principally land, buildings, and other improvements but also any portion of the bundle of rights

restrictive covenant -- private agreements, often contained in deeds or homeowner association documents, regulating what uses and activities are permitted and prohibited on specific property

retained life estate -- a life estate that is kept by the person transferring the remaining interest in his or her property

right of first refusal -- right to purchase property if put up for sale by owner; often requires holder to match a third party offer; owner of property determines when the property is to be sold or transferred

Rule Against Perpetuities -- a confusing and archaic rule that prohibits - and voids - certain interests in land that might not come into existence for 21+ years

"running with the land" -- restrictive covenants that "run with the land" impose obligations on one parcel and benefit another regardless of who owns them

settlement statement -- written list of the buyer's and seller's respective financial payments and obligations on a sale

special benefit assessment -- a charge against property to pay for certain public improvements that benefit it, such as roads or sidewalks

special warranty deed -- deed that contains the grantor's promise to defend title to the property against claims based upon things the grantor has done

Statute of Frauds -- statute that requires agreements affecting land to be in writing

subordination agreement -- agreement by which the holder of a mortgage agrees that a conservation easement (or other obligation) that would otherwise be subject to the mortgage holder's rights will instead have priority over than mortgage

survey -- formal determination of the boundaries of property

tenancy by the entirety -- form of co-ownership exclusive to spouses; similar but not identical to joint tenancy with right of survivorship

tenancy in common -- form of co-ownership where, at the death of a co-owner, that person's interest passes to his/her heirs

title report -- results of title search; written report showing names of property owner(s) and list of liens and encumbrances

title insurance -- insurance policy that pays off in the event that there is any unrecorded or improperly recorded lien or encumbrance on property; may also insure legal access

title search -- a search of land, judgment, tax, and other public records to determine the identity of the owners of property and the existence of any liens or encumbrances

trust -- normally a property right held for the benefit of another; also the legal "entity" that holds such a right

utility easements -- written agreements giving utilities limited rights to use property (either above, on, or below ground) for utilities

waste -- usually actions by a life tenant or co-tenant that affect (usually negatively) the value of property

zoning -- governmental regulation of what uses and activities are permitted and prohibited on land in various areas

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