Blue Ridge Land Conservancy Practices

Standard 9: Ensuring Sound Transactions

Land trust work diligently to see that every land and conservation easement transaction is legally, ethically and technically sound.

Practice 9A: 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

Practice 9A1: Obtain a legal review of every land and conservation easement transaction, appropriate to its complexity, by an attorney experienced in real estate law

Practice 9A2: As dictated by the project, secure appropriate technical expertise, such as in financial, real estate, tax, scientific and land and water management matters

It is the policy of the Conservancy that the Conservancy shall obtain a legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced with real estate law. As dictated by the project, the Conservancy secures appropriate expertise in financial, real estate, tax, scientific, and land and water management matters.

Use of qualified lawyers

The Conservancy shall form and maintain a relationship with a qualified attorney to handle easement review and other routine legal matters. This attorney shall be approved by the Board and shall not represent both the Conservancy and clients wishing to donate easements to the Conservancy. This conflict of interest shall be avoided by either using an attorney from outside the Conservancy's service area, or through written agreement with the attorney.

The Conservancy will ensure that the lawyers who review its projects have training and experience in conservation law and real estate transactions. Any single attorney may not be able to help the land conservancy with all its transaction needs. At various times, the Conservancy may need to consult a lawyer with expertise in property law, or in tax law, or in nonprofit law. On some specialized topics, such as hazardous waste liability or easement amendments, the Conservancy may need someone with specific experience in the issue.

Use of Board members

Handling routine matters with pro bono or reduced-rate legal services from capable lawyers on the Board may be appropriate, provided these lawyers give a high level of care and timely attention to the work and retain outside legal help when needed. Generally, outside counsel is preferable.

Use of standard documents

The Conservancy will use a standard conservation easement template based in part on the latest draft easement language from Virginia Outdoors Foundation if possible to take advantage of the efforts made by VOF to have a strong vetted document reflecting the latest tax and legal rulings.

Template language shall be adapted to the specifics of each transaction, and will be reviewed and updated regularly as the state-of-the-art in drafting language or other circumstances change.

Use of technical experts

If a project requires technical expertise beyond that of the Conservancy's regular attorney, staff or Board, then outside technical expertise may be obtained. For example, donations of land to the Conservancy require a phase I environmental assessment that must be performed by a qualified environmental firm experienced in these reports.

Other areas of expertise

The Conservancy may use various professionals to provide expert advice in other areas, including the following:

- Real estate attorneys to make sure transactions are soundly structured in accordance with state law, properly researched and recorded.
- Real estate brokers to help the Conservancy understand the market it is operating in and appropriate negotiating strategies and pricing.
- Appraisers to estimate the value of a property or conservation easement.
- CPAs to provide tax and financial advice.
- Title review companies to help ensure there are no title problems with the property.
- Title insurance providers for projects involving fee-owned property.
- Experts in biology, ecology, geology or other fields;
- Environmental engineering firms to perform certain environmental reviews.
- Construction engineers to inspect buildings or structures.
- Surveyors to determine property boundaries.
- Government employees to provide information on comprehensive plan compatibility.
- Escrow services prior to closing.

Adopted 04/4/2007; re-adopted 11/4/2009, 09/2/2015; revised 04/4/2018

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Practice 9B: Legal and Financial Advice

1. Do not give individualized legal, financial or tax advice when providing transaction related information

2. Recommend in writing that each party to a land or conservation easement transaction obtain independent legal, financial and tax advice

Practice 9B1: Do not give individualized legal, financial or tax advice when providing transaction related

Practice 9B2: Recommend in writing that each party to a land or conservation easement transaction obtain independent legal, financial and tax advice

It is the policy of the Conservancy that the Conservancy shall refrain from giving individualized legal, financial or tax advice and recommend in writing and require that each party to a land or easement transaction obtain independent legal advice. This shall be placed in writing in the Conservancy's conservation easement application and any materials distributed to potential conservation easement donors. All e-mail correspondence from staff shall have a disclaimer stating that nothing in the e-mail should be construed as legal advice.

For its own protection, the Conservancy shall not engage in a project with a landowner until they have obtained qualified legal counsel.

Written 08/18/2015; approved 09/2/2015; revised 04/4/2018

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Practice 9C: Environmental Due Diligence

1. For every land and conservation easement transaction, conduct or obtain a preliminary environmental investigation, transaction screen or Phase I assessment to identify whether there are any conditions that pose environmental risks, and take steps to address any significant concerns

Practice 9C1: For every land and conservation easement transaction, conduct or obtain a preliminary environmental investigation, transaction screen or Phase I assessment to identify whether there are any conditions that pose environmental risks, and take steps to address any significant concerns

It is the policy of the Conservancy that the Conservancy shall, for every land and conservation easement transaction, conduct or obtain a preliminary environmental investigation, transaction screen or Phase I assessment to identify whether there are any conditions that pose environmental risks, and take steps to address any significant concerns

Written 08/18/2015; approved 09/2/2015; revised 04/4/2018

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Practice 9D: Determining Property Boundaries

1. Determine both the legal description and physical boundaries of each property or conservation easement

2. If a conservation easement contains restrictions or permitted rights that are specific to certain zones or areas within the property, include the locations of these areas in the easement document so that they can be identified in the field

Practice 9D1: Determine both the legal description and physical boundaries of each property or conservation easement

Practice 9D2: If a conservation easement contains restrictions or permitted rights that are specific to certain zones or areas within the property, include the locations of these areas in the easement document so that they can be identified in the field

It is the policy of the Conservancy that the Conservancy shall determine the boundaries of every protected property or conservation easement through legal property descriptions, accurately marked boundary corners or, if appropriate, a survey. If a conservation easement contains restrictions or permitted rights that are specific to certain zones or areas within the property, then the locations of these areas shall be included in the easement document so that they can be identified in the field. If the boundaries of a property cannot be determined sufficiently to defend a conservation easement or identify ownership of fee simple properties, then the Conservancy shall not proceed with the transaction. The Conservancy may require that the donor of an easement or a fee simple property obtain a survey, or the Conservancy may obtain one itself if necessary.

If circumstances warrant consideration of a project without clearly defined boundaries or a survey, the Conservancy shall consult with its legal counsel before taking action.

Written 08/18/2015; approved 09/2/2015; revised 04/4/2018

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Practice 9E: Conservation Easement Drafting

1. For every conservation easement,

a. Individually tailor it to the specific property
b. Identify the conservation values being protected
c. Allow only uses and permitted rights that are not inconsistent with the conservation purposes and that will not significantly impair the protected conservation values
d. Avoid restrictions and permitted rights that the land trust cannot monitor and enforce
e. Include all necessary and appropriate provisions to ensure it is legally enforceable

2. Review, on the land trust's own behalf, each potentially tax-deductible conservation easement for consistency with the Treasury Department regulations (U.S.C. §1.170A-14), especially the conservation purposes test of IRC §170(h)

Practice 9E1: For every conservation easement,

a. Individually tailor it to the specific property
b. Identify the conservation values being protected
c. Allow only uses and permitted rights that are not inconsistent with the conservation purposes and that will not significantly impair the protected conservation values
d. Avoid restrictions and permitted rights that the land trust cannot monitor and enforce
e. Include all necessary and appropriate provisions to ensure it is legally enforceable

Practice 9E2: Review, on the land trust's own behalf, each potentially tax-deductible conservation easement for consistency with the Treasury Department regulations (U.S.C. §1.170A-14), especially the conservation purposes test of IRC §170(h)

It is the policy of the Conservancy that every easement considered by the Conservancy shall be tailored for the property according to project planning and ensure that it:

- identifies the important conservation values protected and public benefit served;
- allows only permitted uses and/or reserved rights that will not significantly impair the protected conservation values;
- contains only restrictions and permitted rights that the Conservancy is capable of monitoring and can enforce.
- If potentially tax-deductible as a conservation easement, that it is consistent with the Treasury Department regulations (U.S.C. §1.170A-14), especially the conservation purposes test of IRC §170(h)

Identifying conservation values and public benefit

Each conservation easement which the Conservancy may consider shall list the important conservation values of the property under the "Recitals" section and "Section I: Purpose" section of the easement,

and/or elsewhere as appropriate according to the template being used by the land conservancy at the time.

Permitted uses and reserved rights

The Conservancy will take care to ensure that any permitted uses and reserved rights do not impair the conservation values listed in the easements, or the purpose of the easement, but instead complement the protection of conservation values and seek to fulfill the purpose of the easement.

Enforceable restrictions

Because the Conservancy under normal circumstances will only monitor a property annually, restrictions shall be appropriate to the monitoring time frame. For example, a prohibition on fishing in a stream may be unenforceable due to the short-term nature of any violation, but a prohibition on new dwellings may be enforceable given the length of time required to build a new dwelling.

Adopted 11/4/2009, 09/2/2015; revised 04/4/2018

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Practice 9G: Recordkeeping

1. Adopt a written records policy that governs how and when organization and transaction records are created, collected, retained, stored and destroyed

2. Keep originals of all documents essential to the defense of each real property transaction in a secure manner and protected from damage or loss

3. Create and keep copies of these documents in a manner such that both originals and copies are not destroyed in a single calamity

The records policy of the Conservancy shall be as follows. [former Practice 2D]

Practice 9G1: Adopt a written records policy that governs how and when organization and transaction records are created, collected, retained, stored and destroyed

FILE STORAGE GUIDELINES

a. Paper Files – In office. Corporate, financial, personnel, payroll, and fundraising records along with personnel files, payroll records, check books and other sensitive materials shall be stored at the Conservancy's office.

b. Paper Files – Archive. Archived files shall be stored in an off-site storage facility.

c. Digital Files. The Conservancy will utilize an online data backup service to backup digital data. When appropriate, documents may be scanned for digital storage instead of or in addition to paper storage.

Practice 9G2: Keep originals of all documents essential to the defense of each real property transaction in a secure manner and protected from damage or loss

ADMINISTRATIVE RECORDS

a. Corporate Records. The following corporate records shall be kept in perpetuity with a copy kept at the Conservancy's office, the original or a copy in the archive, and, as available, a digital copy:

    i. Application for tax exempt status, determination letters recognizing tax exempt status, Articles of Incorporation and any amendments.

    ii. Conservancy bylaws and any amendments, meeting agendas, Board minutes, policies adopted by the Board, Board and committee meeting materials, agendas, meeting minutes, Board profiles, job descriptions and pertinent correspondence.

iii. Solicitation licenses and any other documents required by federal, state, and local law.

iv. Materials pertaining to any legal proceedings involving the Conservancy.

b. Financial Records. The following records will be retained as set forth below:

i. Indefinitely. Annual audits, tax returns and attendant worksheets, capital stock and bond records, bills of sale, vehicle titles, chart of accounts, budgets, grant agreement files, and insurance records

ii. While in effect plus 10 years. Contracts, leases, personnel files, and all correspondence related to any such documents

iii. Seven Years. Invoices to customers and from vendors; payroll records and summaries; employee time sheets; and employee withholding tax statements and all correspondence related to any of the above

iv. Three Years. Bank statements, bank reconciliations, deposit slips, employment applications, and any other financial record not addressed hereinabove shall be retained for a minimum of three years.

c. Fundraising and Membership Records. Development and membership records, including databases, records of contributions, solicitations, donor restrictions and correspondence acknowledging contributions in accordance with Internal Revenue Standards will be kept for a minimum of 7 years. Paper copies of these files will be maintained at the Conservancy office as appropriate. Digital records shall be stored on the Conservancy's server.

d. Outreach Records. Newsletters, outreach materials and other Conservancy publications will be kept for a minimum of 7 years. Digital records shall be stored on the Conservancy server. Published articles may be kept to preserve institutional memory.

Practice 9G3: Create and keep copies of these documents in a manner such that both originals and copies are not destroyed in a single calamity

DOCUMENT DESTRUCTION

a. Sarbanes-Oxley Compliance. The Executive Director shall ensure that purging of any documents is stopped immediately if an investigation is anticipated, underway, or suspected.

b. Periodic Document Destruction. All documents scheduled for destruction will be destroyed using a paper shredder to ensure that any personal, financial, legal or otherwise sensitive information contained in the documents remains secure. The periodic destruction of documents in accordance with this policy will be done on a schedule determined by the Executive Director in a manner compliant with the Sarbanes-Oxley Act.

The Conservancy shall keep originals of all irreplaceable documents essential to the defense of each real property transaction (such as legal agreements, critical correspondence and appraisals) in one location,

and copies in a separate location. Original documents shall be protected from daily use and are secure from fire, floods and other damage.

Originals of all pertinent transaction documents shall be kept in an offsite documents storage facility. These include, but are not limited to:

- Document summary or checklist;
- Site evaluation data or summary;
- Maps (aerial, parcel, topo, etc.);
- Photos;
- Recorded deed or conservation easement;
- Documentation of understandings;
- Title report;
- Escrow instructions and closing statement;
- Maps;
- Survey report, with maps and legal description;
- Appraisal;
- Board resolutions and reports;
- Government forms—such as IRS Form 8283 for acquisitions, IRS Form 8282 for sales (see Practice 10 for further discussion);
- Baseline data;
- Updated resource data;
- Management plans and/or monitoring reports.

Digital copies of all documents shall be stored on the Conservancy's computer network and backed up continuously using an offsite backup service. As new documents are created or modified over time, including but not limited to:

- Changes in ownership or contact information
- Documentation of easement violations and their resolution
- Notices, approvals, denials, interpretations and the exercise of any significant permitted rights
- Monitoring reports both storage locations (original offsite and digital storage) shall be updated.

The Conservancy shall utilize cloud-based services such as QuickBooks Online, DonorPerfect, Landscape and ArcGIS Online to maintain financial, donor, stewardship, and mapping records, respectively, to help minimize the potential for data loss.

Adopted 11/4/2009, 09/2/2015; revised 04/4/2018

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Practice 9H: Title Investigation and Recording

1. Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire

a. Update the title at or just prior to closing

2. Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values

3. Promptly record land and conservation easement transaction documents at the appropriate records office

Practice 9H1: Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire

a. Update the title at or just prior to closing

Practice 9H2: Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values

Practice 9H3: Promptly record land and conservation easement transaction documents at the appropriate records office

It is the policy of the Conservancy to require prior to closing and preferably early in the process a title examination by a title company or attorney of at least 60 years in the Conservancy's favor for all properties. Where a mortgage, lien, separation of mineral or water rights, or other encumbrance exists, it shall be discharged or subordinated prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values, and documentation of it shall be filed according to the Conservancy's record keeping policy. Titles shall be updated at or just prior to closing.

All land and easement transactions shall be recorded at the clerk of the circuit court's office within two business days after documents finalizing the transaction have been signed. As proof of recordation, the Conservancy shall obtain an original copy of the recorded easement as well as a receipt within two business days of recordation. In addition, the Conservancy shall ensure that the appropriate state and local government agencies are notified of the transaction in accordance with state law within five business days of recordation of the transaction.

Before the Conservancy will sign a deed, any required stewardship fees from the donor/seller shall be in the possession of the Conservancy or in escrow. Both the Conservancy and the seller/donor shall sign the baseline documentation report prior to recordation. Additionally, the Conservancy will not sign a

deed before it reviews the appraisal for the transaction if the donor/seller intends to seek tax benefits from the transaction.

Adopted 10/4/2009, 09/2/2015; revised 04/4/2018

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Practice 9H: Purchasing Land or Conservation Easements

1. When buying land, conservation easements or other real property interests, obtain an independent appraisal by a qualified appraiser in advance of closing to support the purchase price

a. However, a letter of opinion from a qualified real estate professional may be obtained in the limited circumstances when:

i. A property has a very low economic value

ii. A full appraisal is not feasible before a public auction

iii. Or the amount paid is significantly below market value

2. In limited circumstances where acquiring land, conservation easements or other real property interests above the appraised value is warranted, contemporaneously document:

a. The justification for the purchase price

b. That there is no private inurement or impermissible private benefit

Practice 9H1: When buying land, conservation easements or other real property interests, obtain an independent appraisal by a qualified appraiser in advance of closing to support the purchase price

a. However, a letter of opinion from a qualified real estate professional may be obtained in the limited circumstances when:
    i. A property has a very low economic value
    ii. A full appraisal is not feasible before a public auction
    iii. Or the amount paid is significantly below market value

Practice 9H2: In limited circumstances where acquiring land, conservation easements or other real property interests above the appraised value is warranted, contemporaneously document:

a. The justification for the purchase price
b. That there is no private inurement or impermissible private benefit

When involved with a land or conservation easement or other property interest purchase, the Conservancy shall obtain an independent appraisal of the property or easement. However, a letter of opinion from a qualified real estate professional may be obtained in the limited circumstances when i.) a property has a very low economic value; ii.) a full appraisal is not feasible before a public auction; or iii.) the amount paid is significantly below market value.

In limited circumstances where acquiring land, conservation easements or other real property interests above the appraised value is warranted, the Conservancy shall contemporaneously document i.) the justification for the purchase price
and ii.) that there is no private inurement or impermissible private benefit The Board shall establish guidelines regarding negotiations for the purchase price and approve any offers. The Conservancy will also keep all parties informed of the process involved in the transaction and be honest and forthright in all its dealings.

In addition to Board supervision, all transactions involving the purchase of land or an easement will be monitored by outside counsel, to assure appropriate due diligence is done and ultimately that the transaction from offer to closing is handled property, and in the best interest of the Conservancy.

Adopted 12/2/2009, 09/2/2015, 5/4/2016; revised 04/4/2018

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Practice 9K: Selling or Transferring Land or Conservation Easements

1. When selling land, conservation easements or other real property interests,

a. Establish protections as appropriate to the property

b. If the sale is to a party other than another tax-exempt organization or public agency, obtain an independent appraisal by a qualified appraiser or a letter of opinion from a qualified real estate professional to determine the value of the asset and to support the selling price

c. Select buyers in a manner that avoids any appearance of impropriety

2. When selling or transferring conservation land or conservation easements to another tax-exempt organization or public agency, consider whether the new holder can fulfill the long-term stewardship and enforcement responsibilities

Practice 9K1: When selling land, conservation easements or other real property interests,

a. Establish protections as appropriate to the property
b. If the sale is to a party other than another tax-exempt organization or public agency, obtain an independent appraisal by a qualified appraiser or a letter of opinion from a qualified real estate professional to determine the value of the asset and to support the selling price
c. Select buyers in a manner that avoids any appearance of impropriety

Practice 9K2: When selling or transferring conservation land or conservation easements to another tax-exempt organization or public agency, consider whether the new holder can fulfill the long-term stewardship and enforcement responsibilities

All transactions involving the sale of conservation land, conservation easements or other real property owned by the Conservancy shall be reviewed by the Board and outside counsel to confirm transactions are proper by all reasonable legal and ethical standards and avoid any appearance of impropriety. Insider transactions will be avoided, but if there is an insider transaction the Conservancy will abide by Practice 4C as appropriate. When selling land, conservation easements or other real property interests, the Conservancy shall establish protections as appropriate to the property. If the sale is to a party other than another tax-exempt organization or public agency, the Conservancy shall obtain an independent appraisal by a qualified appraiser or a letter of opinion from a qualified real estate professional to determine the value of the asset and to support the selling price.

No matter who is involved with a sale of property, all aspects of the transaction will be transparent to the Board, and an independent appraisal will be done prior to a sale to determine the fair market value of the property. The selling price should be consistent with that valuation, unless good reason exists for it to be otherwise, such as the placement of an easement on the property after the appraisal, but before the sale of the land.

If the property doesn't already have a conservation easement on it at the time of its transfer to the Conservancy, it will place an appropriate easement on the property to protect its conservation values,

prior to re-sale. In the case of a transfer to a state or federal agency for a public good or conservation purpose, an easement may not be required or may in fact be inappropriate.

[from former Practice 9L:]

It is the policy of the Conservancy that if the Conservancy shall exchange land or easements to or with another tax-exempt organization or public agency, it shall consider whether the new holder can fulfill the long-term stewardship and enforcement responsibilities, ensure that the transaction does not result in a net loss of important conservation values and, for donated properties, ensure that the transfer is in keeping with the donor's intent.

The Conservancy shall not under normal circumstances transfer easements or conservation land held by the Conservancy for its use (e.g., for environmental education or public recreation) to a party other than a nonprofit organization or public agency.

Adopted 10/2/2009, 09/2/2015; revised 04/4/2018