

Land Trust Ethics

Exploring Nonprofit Accountability

by Stefan Nagel and Konrad Liegel

Stefan Nagel, Esq., and Konrad Liegel, Esq., answer ethics questions concerning nonprofit accountability, fundraising and grant funding in a two-part series. Nagel is of counsel to the Law Office of Stephen J. Small, Esq., P.C. in Boston, Massachusetts. His areas of concentration are complex real estate transactions, conservation and preservation easements and the law of nonprofits. Liegel is a partner with Preston Gates & Ellis in Seattle, Washington, with a concentration in complex conservation transactions and environmental, land use, real estate, and nonprofit law. Nagel and Liegel will be presenting a workshop titled "Legal and Ethical Aspects of Managing a Nonprofit Organization" for the tenth consecutive year at the National Land Conservation Conference, Rally 2004, on October 28-31 in Providence, Rhode Island.



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Land trusts are dependent for their success on public confidence. Without confidence that we will expend the grant funds we receive as promised in our grant applications, governments and foundations will be reluctant to provide grant funds to support the conservation activities of land trusts. Without confidence that we will expend the vast majority of the donations we receive on conservation (and not on fundraising or administration), donors will be reluctant to donate funds to support the conservation activities of land trusts. Without confidence that we will minimize business relationships with the entities on whose land we hold easements, the public will be reluctant to trust that land trusts will in fact enforce the restrictions found in the conservation easements we hold.

In the first part of our two-part column we take up issues relevant to

how land trusts should conduct their nonprofit activities so that the public maintains confidence in land trusts and their conservation mission. We begin with accountability and the lessons land trusts should draw from post-Enron reforms for publicly traded companies.

Nonprofit Accountability

There has been a lot in the news of late about the Sarbanes-Oxley Act and corporate reforms made by publicly traded companies in response to it. What is the relevance of this post-Enron legislation, if any, to how my land trust conducts its business?

Congress passed the American Competitiveness and Corporate Accountability Act of 2002, commonly known as Sarbanes-Oxley, in response to the slew of corporate scandals—Enron, WorldCom, Global Crossing and the like—that badly eroded investors' and the public's trust in publicly traded companies. The purpose of Sarbanes-Oxley is to stop the corporate ethical abuses and rebuild public confidence in America's corporate sector.

Land trusts may not be bound by Sarbanes-Oxley, but they ignore the spirit of this post-Enron law at their peril. Why? Rightly or wrongly, the nonprofit world, like its corporate counterpart, has been tarnished. There is a public perception, for example, that

funds contributed to organizations designed to assist the families of victims of the 9/11 terrorist attacks were misused. Much closer to the land trust community, certain conservation practices of The Nature Conservancy have been questioned in a series of highly publicized articles in *The Washington Post*. If our land trust leaders do not ensure effective governance of their organizations, the government may step forward and also regulate land trust governance.

Let us look at Sarbanes-Oxley more closely. The law imposes a number of new requirements on publicly traded companies, including that there be an independent audit committee of the board of directors, that a "financial expert" serve on the audit committee, that corporate executives certify financial statements, that there be restrictions on auditors providing both audit and non-audit services, and that there be a code of ethics for senior financial officers. Some requirements are imposed directly on publicly traded companies, while others are imposed indirectly, such as the requirements mandating that a company without a financial expert on its audit committee or a code of ethics for senior financial officers disclose this fact.

Although the above provisions of the law apply only to publicly traded

companies, a number of nonprofit organizations are adopting Sarbanes-Oxley-type provisions. (And it should be noted that both the U.S. Senate and a number of state legislatures are considering legislation that would impose Sarbanes-Oxley-type provisions on nonprofits.) For example, 2004 reforms proposed by The Nature Conservancy to govern its nonprofit activities include establishment of an independent and competent audit committee, stringent restrictions on insider transactions, and additional disclosures in its Form 990 that, as a consequence, serves as the nonprofit equivalent of a Sarbanes-Oxley disclosure report.

Given the size of most land trusts relative to national public charities like The Nature Conservancy, we do not advocate that land trusts must adopt Sarbanes-Oxley-type provisions like those proposed by The Nature Conservancy. At the same time, we highly recommend that *all* land trusts consider how to incorporate the spirit and concepts of Sarbanes-Oxley into how they conduct their nonprofit activities, such as:

- Avoidance of conflicts of interests;
- Use of independent audits;
- Disclosure of transparent financial statements; and
- Guidance by a corporate code of ethics.

There are a variety of sources that land trusts may consult in determining which “best practices” to apply to their nonprofit activities. First and foremost, land trusts should adopt *and* implement the Land Trust Alliance’s *Land Trust Standards and Practices*, which are currently being revised by LTA. These *Standards and Practices* take current “best practices” for nonprofits and tailor them to meet the needs of land trusts.

In addition, land trusts should consult Web sites containing standards specifically formulated for nonprofit organizations, such as the Standards for Charity Accountability promulgated recently by the Better Business Bureau’s Wise Giving Alliance [www.give.org] and the Statement of Values and Code of Ethics for Nonprofit and Philan-

thropic Organizations developed by Independent Sector [www.independent-sector.org].

Which provisions to adopt will depend upon the size, scale and scope of each land trust. No one size fits all here. All land trusts should have a written conflict of interest policy, given the potential for conflicts of interest in conservation transactions all land trusts engage in. Not all land trusts, however, need have audited financial statements. Audited financials can be economically impractical for a small land trust, such as one with annual income less than \$250,000. In such a case, the land trust will still want to make sure that it has some type of annual outside financial review.

Our land trust is negotiating an easement with a solar power company. As part of the negotiations, we may be able to obtain a financial interest in the company that would allow our land trust to potentially earn substantial income from its business activities. Does such an arrangement give rise to any real or perceived conflict of interest?

In addition to raising potential unrelated income tax issues (which are beyond the scope of this column), the question raises the possibility of a conflict of interest. We’ve assumed for purposes of preparing this response that the interest which the land trust may obtain in the company would either be directly subject to the easement or could be held indirectly liable (for example, for the payment of legal costs or fines) for easement violations.

The legal and accounting professional associations have long recognized that their professional constituents face potential conflicts of interest when they enter into a business transaction with a client in which the professional knowingly acquires an ownership, possessory, security or other pecuniary interest that may be adverse to the client. See, for example, American Bar Association Model Rules of Professional Conduct, Rule 1.8(a) [www.abanet.org/cpr/mrpc/mrpc_toc.html]. While in this instance the power

company is not technically a “client” of the land trust, at such time as the easement transaction is complete the company and the land trust are placed in potentially adversarial positions. Much like a professional subject to Model Rules, the land trust has to be able to maintain as much independence of action and judgment as possible to assess and deal with violations. Having an interest in a company whose activities will be regulated, in effect, by the land trust detracts from the requisite independence and should therefore be discouraged.

Even if these issues could be appropriately addressed, there are issues of perception that might get the land trust embroiled in a costly, time-consuming public relations campaign with uncertain consequences. The recent difficulties facing The Nature Conservancy provide a case in point. While it appears to us as attorneys that most, if not all, of the activities of The Nature Conservancy that have been questioned by the Senate Finance Committee are defensible under the tax code and other federal and state rules, the negative perception fostered by the media may take a lasting toll. The Nature Conservancy has taken responsive action and effectively employed its public relations resources, but at significant organizational and financial expense.

The consequences to a small, locally based land trust of dealing with their own perceived conflict of interest issues could, in our estimation, be far more severe. A perceived conflict of interest—even if defensible—should therefore be avoided if at all possible. 🌿

In the next issue of Exchange, Stefan Nagel and Konrad Liegel will explore ethics in fundraising and grant funding. If you would like to submit a question on these topics, or on any topic regarding land trust ethics for a future column, please e-mail it to Chris Soto at csoto@lta.org, or fax to 202-638-4730 and mark “Attention: Chris Soto.”