PART 2 - SECUREMENT OPTIONS

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SECUREMENT OPTIONS

2.1 Overview: Land Trusts' Options

Member groups of the Ontario Land Trust Alliance adopt the OLTA statement of land trusts standards & practices as a condition of membership. These standards and practices include the following, which are particularly relevant to how land trusts consider and carry out land securement options:

Standard 8: Selecting Projects: *A land trust must be selective in choosing projects.*

Standard 9: Choosing the Best Conservation Method: *A land trust must select the best available practical method for protecting each property.*

Standard 10: Examining the Property: *A land trust must compile and maintain knowledge about each property it protects.*

Standard 11: Ensuring Sound Transactions: *A land trust must ensure that every transaction is legally and technically sound, and avoid foreseeable future legal problems.*

While there are a number of different techniques used by various conservation organizations, land trusts focus on using *on title* options to conserve lands. These options include: options and rights of first refusal; leases; conservation easements; different types of other agreements; fee simple purchases; fee simple donations, including trade lands; and other creative arrangements.

Building upon the introduction in Part 1 of this manual, the following is intended to provide a general overview of these securement techniques with detailed templates provided in the appendices. It is important to remember that the descriptions and templates provide only a background for carrying out transactions and cannot be relied upon in and of themselves. There are many aspects and implications that may not have been fully covered here but may be relevant in a particular situation. Accordingly, a land trust will want to ensure that it receives experienced legal and other professional advice before undertaking land securement activities.

The key to implementing any of the following techniques is successful negotiations with landowners. Negotiations are based on a "willing buyer - willing seller" or donor relationship being established. While the use of these techniques requires some creativity and discussion, a land trust can help a landowner work out the best arrangement to suit the circumstances. Part 3 includes helpful advice to land trusts regarding the negotiation process.

The box below outlines how these options relate to one another and to some of the financial options discussed in Part 4 of the manual. In part, the chart provides an overview. However, land trusts can also use it to consider their own approaches to a

transaction and guide landowners through the various options.

FIGURE 1: CONSERVATION AND FINANCIAL OPTIONS

CONSERVATION CHOICES

Retain Land Ownership
- Good Land Management - information, planning, action
- Short-term Agreements - lease, management agreement
- Long-term Restrictions - conservation easement

Transfer Land Ownership

- Now i. unrestricted transfer of land title
  ii. restricted transfer of land title
  - retain life estate, restrictions, lease back
- Later - option to buy, right of first refusal, will, charitable trust

FINANCIAL ASPECTS

Sales - market price, bargain price, installment, exchange
Donations - tax benefits, non-financial benefits

Taxes - income, goods and services, property, transfer, probate, other taxes
Fees - survey, appraisal, legal, financial/tax, planning, land management fees

2.2 Beginning a Relationship with a Landowner

2.2.1 Relating Stewardship to Securement

Securement involves acquiring a legal interest in a property that allows a land trust to protect or enhance the values present there. The legal interest requires maintenance in some cases, but usually it is a fairly static situation. However, the land and its features are anything but static. Consequently, there is a relationship between a dynamic landscape and the stable legal tenure.

The landscape and uses involved will influence the choice of securement technique, both at the outset and later on. The converse may also occur: securement will affect the landscape. For example, a limestone pavement “alvar” may be grazed by cattle that help keep shrubs from replacing rare grasses and wildflowers. The current owner may agree to lease the property to a neighbour for grazing before donating it to the land trust. The lease will help ensure appropriate management of the property while raising funds for long-term stewardship. However, if the word gets out that the property now

has little supervision, or that the plants are prime photographic subjects on what is seen as “public” land, then the land trust may wish to enter a management agreement with a photography club or other neighbour to put up signs or fences and monitor activity.

Obviously, once a property is acquired, it will require some form of ongoing management or stewardship. This may be of an intensive or more passive nature and is best coordinated through a management plan (see Part 6 of this manual). As time goes on, as nearby uses and players change, as incentives shift and new opportunities or priorities arise, the securement technique and the day-to-day management body may change as well.

Activities carried out for land management purposes can complement, and occasionally conflict with, securement practices. In the above example, a grazing lease helps manage the woody vegetation and signals that the property is being looked after. In another case, an annual inspection for a conservation easement could be used to identify changes in the species, ecology or external threats to a property which can lead to making recommendations to the landowner to help address management concerns. A conflict could arise if a management agreement or conservation easement with the land trust was seen in other circles as granting a general right for the public to enter and use (and abuse) the land, resulting in the need to take curative management actions (and perhaps hindering the negotiation of agreements with others in the vicinity). The various tax incentives described in Part 4, and the management practices either intended or otherwise induced, will also have an influence on private landowners, their decisions around securement, and the stewardship undertaken by the land trust once a legal interest in the land is obtained.

2.2.2 Options to Purchase

An option to purchase is a contract allowing the land trust to buy the land at a set price after a period of time. Usually, the holder of the option (the land trust) pays an amount for this right (perhaps $50 to $200 or more, or a nominal sum of $2), which is separate from the land purchase price set out in the option. The seller of the option may be willing to allow the price of the option to be deducted from the final purchase price, once the purchase is completed. It does not affect the rights of the landowner to use the property nor does it give the land trust the right to manage and conserve it. However, it does prevent the owner from disposing of all or any part of the property during the option’s period.

An option is essentially a written contract or offer by the landowner to sell the property and not to withdraw this offer during the time period specified (see the example in Appendix 2A). It can be separate from, or incorporated within, the Agreement of Purchase and Sale. It usually describes the land concerned, the amount to be paid to obtain the option, the time period during which it may be exercised, any other termination provisions, the purchase price or formula, and any other conditions that must be satisfied. An option creates an interest in land which can then be registered on the land title and thus gives notice to other potential purchasers. However, it need not

be registered to be an enforceable contract. The land trust has the discretion to decide whether to exercise the option and, if so, to then meet all of its conditions. The option will end when its specified time has run out, when the holder exercises it, or when the landowner terminates it (this can occur only where the landowner has retained this right).

Obtaining an option is an intermediary step towards securing and protecting land, for it merely leads to the right to purchase a property. At a modest price, it is often used to buy time for the land trust to raise the purchase funds once a potential agreement to buy and sell is reached. If the land trust is not successful in its fundraising, it can decide not to exercise the option. It may also allow for the land trust to prioritize its acquisitions, such as waiting to see if negotiations for a better or complementary property can be completed before carrying through with the purchase of the property under the option. An option can insulate the land trust from price fluctuations, or can help create distance from or settle a difference over the details or value of land by establishing a formula which can then be applied when more information is available.

While useful in some of these situations, the option does cost money and negotiation time to obtain without providing any control over the use of the land. If it is made for a certain price, it is also a prediction that the market value will not decline to a significant degree. Thus, it is of limited value unless the land trust is seriously interested in acquiring the property.

2.2.3 Rights of First Refusal

A Right of First Refusal provides the land trust with the first option to purchase a property if and when it comes up for sale on the open market or a bona fide third-party offer is made. The Right of First Refusal (or first right) is a legal agreement which sets out the conditions of sale, is registered on title to the property, and may be acquired for free or perhaps a nominal amount (e.g., $2.00). A sample first right is included in Appendix 2B.

A first right allows the land trust to purchase a key property sometime in the future, and as such provides an interim level of protection to the lands (although it does not restrict land use or development). The primary disadvantage is that the land trust may not know when a first right may surface in the future and the timeline negotiated when the first right was granted may not be sufficient for traditional fundraising to be completed.

A first right may be a useful option in cases where negotiations to acquire a key holding have halted due to an unacceptable appraised value. Once the owner finds someone who will pay a certain price, the land trust would then have the right to match it without having to negotiate to the original, often inflated, price expectations. Having a first right on a property can also be a means to discourage interest from other buyers since they will know they have competition and the holder of the first right has priority. For this to occur, the first right has to be registered on the title to alert any other buyers. There may also be situations where a property transfer or exchange may be made on the basis that

the new owner, perhaps a government agency or other conservation organization, will keep and manage the property. Should the property not be required any longer, the arrangement could provide for the land trust to retain the right to buy back the property either at a set or nominal price (an option) or at the going market rate (via exercising a right of first refusal).

2.3 **Agreements**

Landowners can choose from a variety of agreements when interested in conserving land. Leases and management agreements are more established and familiar forms, while a conservation easement allows you to protect land over the long term, even under a change in ownership. A conservation easement is a type of agreement, but will be considered under a separate heading due to its particular nature. This section explains the differences between these types of agreements and how they might be used for conservation purposes.

Leases are agreements that enable someone to come onto and exclusively use someone else's property for a specific time period, usually subject to paying rent and following certain conditions. A lease creates an interest in land, and thus if the land is sold or otherwise disposed, the lease generally continues until its term is completed.

A management agreement can be more limited in scope than a lease, allowing access by specified individuals or organizations to carry out specific activities, such as conducting research, restoring an eroded bank, or collecting berries. This type of contract is generally personal to the contracting parties and not binding on a new owner.

Both leases and management agreements can be used by private landowners or by conservation groups, either on their own property or in carrying out activities for others. For example, you might lease out an unused field to a neighbouring farmer, with conditions to maintain the hedgerows and avoid pesticides near the pond. Perhaps on another corner of the same property, a local club would enter a management agreement to plant, tend, and monitor trees for you. Both of these types of agreement allow flexibility in determining their contents, their length of time, and who can participate. They enable others to work part or all of the land in an appropriate way, perhaps for a trial period, while the landowner still owns the property.

2.3.1 Informal and Handshake Agreements

Informal and “handshake” agreements are just that—they are not legally binding on the parties. They may not even be written down, just a few principles sealed with a handshake or nod. In many landowner contact programs, such an agreement may be the starting point or perhaps the only result that is sought. An example is found in Appendix 2C.

An oral agreement may be made, but having the agreement written down is generally

preferable in order to make it clear for everyone involved. If the agreement is to be nonbinding on the parties, some indication of this should be made, such as an explicit statement to this effect or use of a term like “memorandum of understanding.” The agreement can be for as long as the parties want it to be, although it will end if the property is transferred, if the individual making it dies, or if the parties agree to change or end it. Further, the agreement also will effectively end if one or the other party decides not to carry it out, for it cannot be enforced in court. While oral agreements are generally nonbinding, if there is the intent to be binding, oral agreements can still be binding contracts relating to most matters (except land rights, which must be in a written form).

While these agreements are usually informal and not binding, that does not mean they have no value in land securement. They do have some advantages. As discussed above, they may provide the beginning or clarification of a relationship between a land trust and a landowner which, through the building of trust or the working out of details, can evolve over time into some of the other options described here. The informal agreement will likely still carry full authority with both parties and both will seek to honour it, even if a court will not enforce it. For many people, that may be good enough and the agreement may thereby accomplish as much for conservation as a formal, signed document. Nonetheless, one can never be sure and therefore most land trusts will try to secure a legal right to protect the land.

2.3.2 Contracts and Management Agreements

A contract is an agreement between two parties. A management agreement is a contract between a landowner and another individual or organization to allow the latter to take care of the land. Unlike a lease, the management agreement does not allow the manager the right to occupy the lands to the exclusion of the owner. A legally binding contract has the formalities of an offer (or counter-offer), an acceptance and some exchange of value (legally called “consideration”) or alternatively made under a formal seal. The agreement is made between the two or more parties involved for as long as they decide, but it does not bind the land title nor future landowners (unless there is special authority in a statute; see Section 2.4.2). Usually, and preferably, contracts and management agreements are written but they also can be made orally if the formalities are still met. A contract terminates after the agreement’s time period ends, its conditions are met, the land ownership has changed, or one of the parties has died.

A contract or management agreement specifies who will do what. If the landowner does not have the resources or skills to manage all or part of the property, the land trust may decide to enter into a management agreement with the owner that allows the group to have access to, maintain, alter, enhance, or otherwise manage the lands. Similarly, the land trust may seek someone else to manage some or all of the responsibilities on the land. In either case, the agreement will specify the understandings between the parties.

The agreement may cover such items as maintaining or establishing signs or trails, planting and tending vegetation, removal of garbage or invasive plants, uses, who bears

any liability, and paying the costs for doing this work. Various procedures may also be set out in the agreement. These include: who pays for what, how long the agreement lasts and how may it otherwise be terminated, what further communications are required (such as notice or approvals needed to do further work), where or to whom communications should be directed, what happens if there is a dispute in the future, how certain terms and laws are to be interpreted, etc. Some contracts and agreements have extensive “boilerplate” that has been developed to clarify situations, often in response to court interpretations of other contracts. Using a current model or checklist will help ensure all the details are covered, which helps avoid problems in the future (see the examples in Appendix 2D).

A management agreement avoids many of the costs of acquiring land or a partial interest in it. It can be tailor-made to the circumstances of the land, its owner and manager and can specify precisely what should be done. It allows a land trust to acquire lands it may not be able to manage itself, or manage lands it may not be able to acquire. It may also lead to a heightened sharing and awareness of conservation principles between the parties. The landowner has the benefit of the expertise and presence of the land manager. Yet generally, the agreement will not prevent the disposal of the land nor control its use once it is transferred (except where elaborate mechanisms are included to require restrictions in subsequent documents dealing with the property, or there is special statutory authority). This may be an advantage for the owner and a disadvantage for the manager, particularly if the latter has invested effort and resources into the property.

A licence is another type of legal contract that gives someone a right to do something on another’s property (see the example in Appendix 2E). It does not create an interest in land but can be established for a specified term or be revocable at the will of the grantor. A licence could give the land trust a right to enter onto a property to do a survey or study or carry out agreed management activities. It again could begin a relationship that might evolve into something more permanent. Conversely, a land trust could use a licence to give the donor of land or the donor’s children the right to enter the property, gather firewood or carry out other activities that make the donation arrangement more attractive. This type of arrangement may affect whether the donation is considered a “gift” for income tax purposes and may affect an appraisal of the donation’s value. The donor or donor’s children may have a licence to live on or use the property which would end upon their death, thereby achieving the donation of a life estate (see Section 2.6.2).

2.3.3 Leases

A lease is a written agreement whereby the landowner allows another party to occupy the land. It is this right to exclusively occupy lands for a period of time under certain conditions that creates a legal interest in land and thereby distinguishes a lease from a contract or management agreement. Usually the lease will specify who has responsibility for what and it will require rent to be paid by the party leasing the land.

The terms and conditions of the lease will depend on the situation and parties involved.

The lease will generally specify whether rent is paid in money or in-kind (or not at all), to what extent it will increase over time, when it is due, and what happens if it is not paid on time or at all. Importantly for both the landlord and the tenant, the lease will specify what activities are permitted or required on the property, as well as many of the procedures and other matters discussed above for contracts and other agreements. Tenants are not allowed to abuse or destroy the property during their tenure.

Along with particulars concerning rent and permitted activities or conditions, a lease must specify the parties, the land and premises involved, and the commencement and duration of the lease. As for other types of agreements, the term of the lease may be for as long as the parties determine and can be renewable under specified conditions. However, unlike the previous types of agreements which only bind those who enter them, a lease creates an interest in land. Thus, if registered on the land title, a lease can bind future landowners to its terms. The tenant is usually granted the right of “quiet enjoyment” of the property whereby they will not be subject to undue disturbance or interference.

A lease may be useful to a land trust in a number of situations. First, a land trust may lease a property from a willing landowner in order to manage it and pay associated expenses. By registering the lease on title, the land trust will be sure that it will be able to protect the land within the scope of the lease for as long as the lease is valid, even if the ownership changes. Second, a land trust could lease land that it owns to another individual or organization. This would reduce the owner’s direct management responsibilities and carrying costs. This type of arrangement is being used to lease some conservation organizations’ lands to government agencies to establish provincial parks and nature reserves. Some organizations and agencies have special property tax situations, and thus a lease can help take advantage of some of these opportunities (see Section 4.3.5 for further details).

A lease is subject to both the common law and also the statutory rules governing leases, including the *Short Forms of Leases Act* and *Conveyancing and Law of Property Act*, among others. Where a lease covers only a part of a property and is for a term of twenty-one years or more, or is renewable for a term at least this long, it may require a municipal consent under the *Planning Act* since it will be seen as subdividing the land (see Section 5.5 on lot creation for further discussion on this topic).

The purchase price or value of a tax receipt will usually reflect any lease and rent affecting the property. In the case of fee simple donations of “Ecological Gifts,” any lease agreement for these lands *must* be approved by the certifying authority, currently the Ontario Region of the Canadian Wildlife Service. If the certifying authority does not grant approval for the lease, the owner may be liable to a significant tax penalty under the *Income Tax Act (Canada)* (see Section 4.2.4 for details).

As one variation in using a lease, a land trust could acquire the land and then lease it back to the original owner. Generally, such an arrangement will be part of the initial negotiations to secure the land. Such a lease may be designed in at least two ways.

First, the owner could pay market rent for the lease for a period of years (based on a third-party opinion of comparable local lease rates). Alternatively, the value of the purchase price or tax receipt could be either reduced to account for the value of the lease interest over the period of the lease, or increased if lease income is involved.

A standard lease agreement is found in Appendix 2F. A number of clauses are strongly recommended to be included in the lease agreement. These and all other provisions should be discussed up front during the negotiation process.

2.4 **Conservation Easements and Other Title Restrictions**

This section deals with restrictions that bind the land title and future landowners. They include conservation easements under the *Conservation Land Act*, other statutory restrictions, and those available under the common law or courts of equity.

2.4.1 Conservation Easements

A conservation easement under the *Conservation Land Act*[1] is an agreement voluntarily entered between a landowner and a qualified organization (e.g., a land trust, conservation authority, or government agency) that sets out restrictions on land use and management in order to protect the property over the longer term. The owner still retains ownership, control of and the ability to sell the property, yet must do so within the terms of the agreement.

Once a conservation easement is registered on the title to the land in the land registry office, it will bind current and future owners to the terms of the agreement. This ability to protect land long into the future, despite changes in ownership, is what makes easements a powerful conservation tool and different from other types of agreements. In contrast, a contract or management agreement is effective only as long as the grantor of the agreement owns the land.

The ordinary common law easements and equitable covenants require someone to own nearby land and their use for conservation is somewhat uncertain. Consequently, such barriers had to be removed through legislation. Because of their statutory, restrictive, and conservation nature, conservation easements are also different from the usual and more familiar right-of-way easements for driveways or utilities.

Most easement holders have developed criteria for determining under what circumstances they might be interested in entering an easement. Changes can be made to the easement by mutual consent, but usually occur only where they strengthen

[1] This section will focus on the provisions in the *Conservation Land Act*, R.S.O. 1990, c.C.28, since it is the only statute that allows land trusts to acquire conservation easements directly. However, see the following sections for other related authority. The *Conservation Land Act* was amended to allow easements by the *Statute Law Amendment Act (Government Management and Services), 1994*, Statutes of Ontario 1994, chapter 27.Key is subsection 128(2), proclaimed in force in *The Ontario Gazette*, January 28, 1995, Volume 128-4, p. 158.

the easement's conservation value. The organization holding the easement will take on the responsibility of occasionally monitoring the property, and like all agreements, has the right to enforce it if necessary. Monitoring is usually compared against a baseline report prepared at the time of signing the easement[2]. A land trust may ask for a contribution from an easement donor to help with associated future expenses, such as monitoring and enforcement.

Conservation easements may be useful in a number of situations:

- They can protect land over the long term, at little cost to either the landowner or easement holder, and with minimal intrusion on the landowner's activities.
- They can apply to all or only a portion of a property.
- They can be donated for a tax receipt, purchased or traded for equivalent value.
- They can be created in a will to resolve potential future family disputes (but best negotiated in advance to ensure the easement achieves its intended goals).
- They can be retained or granted by a government to protect features on lands that it owns and will later dispose or sell.
- They can be used to legally guarantee conservation before a transfer is made to another organization.
- They can be granted by developers to a land trust or municipality to continue protecting part (or certain aspects of all) of a site after it is developed.

Conservation easements allow land trusts to provide long-term securement to lands which may not be available through fee simple purchase or donation.

The grassroots aspect of conservation easements is also a powerful motivation for landowners who have stewarded their lands, sometimes for generations, and wish to see that stewardship continue beyond their ownership. Conservation easements are particularly effective on lands where the existing use is complementary to conservation, such as recreational properties, managed forests, or agricultural lands with a “back forty” natural area.

Like a lease or management agreement, a conservation easement is written up in a legal agreement tailored to meet the landowner’s financial and personal needs while allowing the organization to protect identified features (a model conservation easement is included in Appendix 2G). This flexibility is a very useful aspect when negotiating with a landowner. A conservation easement may be donated, sold or purchased by a qualified organization. Unless the people signing want it to be so, there is no right of public access given in a conservation easement.

A conservation easement has two main parts: a “covenant” that requires the landowner to do or not do something, such as cutting trees, and an “easement” allowing the land trust to enter onto the property to monitor and enforce the covenant's conditions. There are somewhat different legal procedures and implications depending upon whether the

[2] A useful guide to such baseline reports is: *Baseline Reporting for Natural Heritage Easements in Ontario*, Jason Thorne, Ontario Heritage Foundation, 1997.

interest is seen as a covenant or an easement. The conservation easement document also has a number of paragraphs defining the ongoing relationship between the landowner and the organization.

A land trust must meet two criteria to be able to hold a conservation easement: be a registered charity and be provincially or federally incorporated. Most land trusts and non-government conservation organizations will meet these two criteria. There is no need to be designated by government as a qualified conservation body; a land trust merely needs to meet the criteria set in one of the paragraphs in Subsection 3(1) of the *Conservation Land Act*. Care must be taken to maintain corporate and charitable status, otherwise the easement becomes automatically assigned to the Minister of Natural Resources.

Conservation easements can be entered for a range of conservation purposes under Subsection 3(2) of the Act. This subsection reads:

> 2) An owner of land may grant an easement to or enter into a covenant with a conservation body,
>
> (a) for the conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land; or
>
> (b) for access to the land for these purposes.

Care must be taken when drafting conservation easements in order that the document clearly relates to these purposes.

A conservation easement could be held "in common" or on a specified proportionate basis by two or more conservation bodies. If one group loses its status or otherwise becomes disinterested, the other(s) can still hold the conservation easement. Such an arrangement may be useful to bring a local organization, with close involvement in the community, together with a larger, more stable and experienced organization that may have the resources to enforce the easement, if necessary. Also, different expertise can be brought into the arrangement, such as agricultural and natural heritage perspectives contributed by two different organizations. A "backup" holder might be designated in the conservation easement where the backup holder does not become involved until the principal holder either loses its status or perhaps fails to enforce the agreement. Obviously, careful drafting and clear roles of the individual organizations will be required in order to establish these arrangements.

In most cases, land trusts have designed conservation easements to affect all of the land, with differing levels of restrictions on use and development to reflect the relative natural values. For example, on a parcel of land with a natural area and a working farm, restrictions can be tailored to allow for existing, compatible uses on the agricultural portion of the land, and more restrictions for the natural area. Different zones within an easement are preferably defined through a formal survey. Lines on a topographic map or aerial photograph might also be used but may run the risk of being considered too vague to be upheld if the easement is challenged in court.

The land may be restricted from future subdivision altogether, or limited to one or two retirement lots. Sections applicable only to the natural area may be more restrictive, with limits on timber harvesting, construction of buildings, roads, and other such uses which would be incompatible with long-term conservation of natural features. Easements are simpler to negotiate, monitor and enforce if they avoid both detailed restrictions which are not essential to protecting the features identified and those which the land trust does not plan to monitor and enforce. Using quantitative rather than qualitative restrictions can also make enforcement more straightforward.

If only a portion of the land is of interest, the conservation easement may be registered against only that portion. This will usually require local approval under the *Planning Act* as a severance of the lot (see Section 5.5). The area subject to the conservation easement may need to be surveyed if a legal description of the area, acceptable for registration, is not otherwise available.

A land trust will want to find out about the ownership of the property, specifically whether there are any mortgages, charges, liens or other encumbrances which could impact the effectiveness of registering the conservation easement on title. Default of a mortgage registered in priority to the conservation easement would allow the mortgage holder to sell the property free and clear of the conservation easement. However, it is possible to have a mortgage holder allow the conservation easement to be registered in priority; this may be difficult to negotiate if the easement represents a significant portion of the land's value. Consequently, before significant organizational time and financial resources are invested or registration is relied upon, a "postponement" should be pursued to ensure that the easement is enforceable.

Generally, a land trust should allow at least six to nine months to complete a conservation easement, from the point of initial contact to execution of the agreement. When preparing a conservation easement, it is important to read Section 3 of the *Conservation Land Act* very carefully. If challenged in court, the land trust will want to be sure that the easement fits squarely on its statutory authority. Conservation easements also are subject to a broad range of other legislation, including the *Land Titles Act*, *Registry Act*, *Planning Act* and a host of others. Given the unique aspects of easements, specific legal advice is usually necessary to ensure compliance with all applicable laws.

2.4.2 Other Statutory Restrictions and Agreements

Conservation easements under the *Conservation Land Act* are likely to be the most common type of long-term conservation agreement now used across Ontario and the only type available directly to land trusts. Nonetheless, they are only one type within a family of agreements that can bind title, be applied for conservation purposes, and do not require nearby lands or other common law or equity conditions. There are also

some limits to the application of conservation easements. Thus, where non-conservation purposes or other limitations may be involved in a transaction, other types of conservation agreements that bind the land title may be appropriate, as discussed in this section. Alternatively, it may be better to acquire the full title to the land rather than a partial interest.

Besides conservation easements, the second type of statutory restriction is the heritage easement which, until recently, was the principal statutory agreement used for conservation purposes. Heritage easements have been available since 1972 under sections 7, 10 and 22 of the *Ontario Heritage Act* whereby agreements can be entered to "preserve, maintain, reconstruct, restore and manage property of historical, architectural, archaeological, recreational, aesthetic and scenic interest". Such covenants and easements can be entered by the Ontario Heritage Foundation or the Minister of Citizenship, Culture and Recreation. Municipalities can also enter conservation easements for the "conservation of buildings of historic or architectural value or interest" under Section 37 of this Act. The broad heritage easement powers may be extended to land trusts, other organizations and agencies through first the acquisition and then assignment of the easement by the OHF, Minister of Citizenship, Culture and Recreation, or municipalities.

A third type of statutory restriction is the agricultural easement under Section 5 of the *Agriculture and Food Institute of Ontario Act, 1996*. The Agriculture and Food Institute of Ontario (AFIO) is a government agency authorized by this Act to enter into, register, and assign "agreements, covenants or easements for the conservation, protection or preservation of agricultural lands" in locations defined by a regulation. A program was initially established to purchase these interests to conserve the Niagara tender fruit lands area, but the program was canceled in 1995 before it was ever implemented. The legislation still remains in place, however, and varies only slightly from the *Conservation Land Act* provisions.

A fourth category of similar interest in Ontario is a loose collection of other statutes that allow agreements to be registered on title for purposes with potential conservation applications. These statutes tend to be quite focused in their purpose, lack detail concerning procedure or application, and only allow the provincial or municipal government to register these agreements. This statutory authority includes:

- *Forestry Act*, sections 2-3 (wood production, wildlife habitat, flood and erosion protection, recreation, and water supplies);
- *Fish and Wildlife Conservation Act*, s.81 (wildlife management and habitat);
- *Ministry of Government Services Act*, s.10, and as referenced in other statutes ("public works"—all government property);
- *Municipal Act*, s.194 ("public utility"—water works or supply);
- *Ontario Water Resources Act*, s.27 (water or sewage works);
- *Planning Act*, ss. 41(10) and 51(26) (site plan and subdivision control agreements);
- *Public Lands Act*, s.46 ("public works", as in the *Ministry of Government Services Act*, noted above).

The *Land Titles Act*, sections 118 and 119, also allows for certain types of restrictions to be registered on the land title, as detailed in the later section on Transfers with Restrictions.

These provisions allow certain agreements to be registered on title and may be useful in some circumstances. These options are thus available if the authority found under the other types of registerable conservation agreements is too limited for the land trust's intended purposes.

Where none of the legislation described above is appropriate, common law easements, equitable covenants and other interests in land (e.g., leases or *profits à prendre*) may be considered. Contracts, and management agreements might be other legal arrangements useful in such circumstances, but again they only legally bind those who sign them.

2.4.3 Common Law and Equitable Restrictions

Long before legislation defined statutory-based restrictions on title, legal concepts for easements and covenants were established by judges' decisions (i.e., the common law), beginning in Britain. A common law easement is the right of someone, or the obligation of a landowner to allow that person, to go onto or use specific land for a particular purpose. Like the statutory conservation easements and other restrictions described above, common law easements will bind the subsequent landowners who did not sign the original document.

A covenant is the binding written obligation to do (i.e. "positive") or not do (i.e. "negative" or "restrictive") something, usually in relation to land. Covenants were enforceable at common law in limited situations, yet the courts of equity did enable only restrictive covenants to be enforceable against future owners of the subject land.

Common law easements and equitable restrictive covenants are frequently used today to secure access, restrict development, preserve views, and the like. However, they are subject to a number of limitations which may restrict both their use and their enforcement against subsequent landowners. Key among these are that:

- there must be land nearby which benefits from the easement or covenant on another property;
- the benefit must be recognized by the courts (and it is unclear whether conservation would be so recognized);
- covenants can only be restrictive, not positive; and,
- the interest in a covenant or easement cannot be assigned or passed along to anyone else.

These limitations, particularly for nearby land, in the common law and equity can only

be overcome by passing a statute to change these rules, such as has occurred for conservation easements and the other restrictions noted in the previous section. Nonetheless, easements and covenants may provide more flexibility in some cases should the agreement purposes or type of organization involved not fit with those in the statutes.

One other common law alternative is the *profit à prendre*. This interest in land was devised to allow someone to own the right to go onto someone else's property to take specified resources (e.g., timber, minerals, or gravel). Unlike common law covenants and easements, a *profit à prendre* is held "in gross," meaning that it need not be referenced to nearby property.

2.5 **Simple Means to Transfer Title**

2.5.1 Basics of a Transfer

A transfer of a property's ownership from one or more landowners to the land trust is the most common and greatest level of securement achievable. A transfer is a legal procedure with a certain number of associated steps and formalities. It must be made in writing and it should always be immediately recorded in the local land registry office (see Section 1.2 of this manual for details on these real estate basics).

Usually the transfer involves the full interest or title, the "fee simple," but it can also involve only a part of the property or only some but not all of the legal rights embodied in the property. The basis of the transfer can include either (or both) the payment of money in a purchase or the making of a donation of the property, or perhaps the trade or exchange of properties. The transfer formalities are largely the same in any case. This section deals with the common transfer situations of purchases and sales, and donations and bequests. More creative variations are presented in the subsequent section.

2.5.2 Purchases

A fee simple purchase may involve the acquisition of all or part of a property in exchange for money. The purchase process may be preceded by the land trust holding an option or right of first refusal, discussed above in Section 2.2, although most often a purchase is negotiated on its own. The purchase process, including price, timelines, and conditions, is usually set out in an Agreement of Purchase and Sale. More creative arrangements such as a purchase of a conservation easement, purchase with a lease or sale-back of the property, purchase with a retained life interest, or bargain sale are based upon the same fundamentals as a fee simple purchase, but add a few other twists or combine techniques to make a deal possible. Again, these latter approaches are discussed in detail in the next section.

The value of the land is determined by an accredited third-party appraiser (see Section

4.1 of this manual). As a matter of policy, some land trusts only offer up to a maximum of 100 per cent or a small percentage higher of the appraised market value of a property. This reflects the need to be responsible with charitable funds raised from the community and to ensure that purchases are made with a strong consideration of independent expert opinions rather than more subjective appraisals of value. With such a policy in place, land trust negotiators know the bounds within which the land trust has given them scope to negotiate and also can point out this limitation to the landowner so that the landowner does not hold out false hope for a higher price.

Obviously, the land trust will try to negotiate a lower price in order to conserve its resources for other purposes. Given that land trusts are non-governmental in nature and raise funds from the community for laudable goals, some landowners may be prepared to accept a somewhat lower price than they would from others.

A fee simple purchase can involve the raising of substantial sums of money, both to acquire the land and also to pay for associated costs such as legal advice, survey, appraisals, and long-term stewardship, etc. Accordingly, it is important that the lands under consideration for purchase have highly significant biodiversity or other values considered a priority by the land trust. A purchase also requires negotiators to work closely with the financial and fundraising arms of the land trust to ensure that the on-the-ground negotiations with the landowner provide for realistic fundraising deadlines and targets.

A purchase can be financed a number of ways. The land trust can simply have the funds in its bank account and write a cheque for the set amount when the purchase is completed. The land trust may also seek to finance the purchase through a mortgage, either held in favour of a financial institution, the vendor (called a vendor take-back mortgage), or a supportive private individual or organization. In some situations, financing can be spread out over a period of time, such as through periodic payments (similar to a mortgage) or the purchase of a series of particular lots in a complex of properties over time. As noted earlier, an option can be obtained to allow the land trust time to raise funds to complete the transfer.

Often only a portion of the land is of interest to the land trust and as such the acquisition may require local government approval to create a new lot. In some instances, the land trust may take title in the name of a Crown agency partner, to avoid the requirement to legally sever the lot through a formal planning process. See Section 5.5. of this manual for a further discussion of the lot creation and approvals process.

2.5.3 Sales

Most often land trusts will seek to acquire land, including through purchase and donation. However, in some cases, land trusts may wish to sell their lands. Reasons for doing so can include:

- the land trust has acquired a property it does not intend to keep and will sell it to

raise funds for its other programs;

- the land trust only needed to acquire part of the property in order to protect identified features and thus can dispose of the remainder;
- a conservation easement has now been placed on the property and continued ownership is not required to protect it further;
- the land trust has modified its priorities and thus will dispose of properties that do not meet its current criteria for level of significance, geographical location, etc.; or
- the land trust has folded, amalgamated with another organization or lost its charitable status, and thus must dispose of some or all of its assets including land (all very rare and unusual events largely avoided by careful planning).

Disposing of properties can be carried out by a sale at a market or discounted price or through a trade with or donation to another organization. Often a transfer to a similar organization will be made at a nominal amount. In any case, several factors need to be considered. First and foremost is to ensure that the disposition is consistent with the land trust's objectives, policies and legal responsibilities, including those under the *Income Tax Act (Canada)* and provincial charities and trust legislation.

If the property was a donation to the land trust, there may be a number of limitations or preconditions that must be satisfied before a transfer can occur. If possible, the approval of the donor should be obtained in order to maintain a good relationship with the donor and family as well as a positive public image in the community. This approval may well be obtained before the donation is made whereby the donor is clearly informed that the property will be sold to raise funds. This type of property is sometimes called "trade land" and likely will not be placed into government incentive programs.

A donated property may have been given with explicit conditions that it be maintained by the land trust. If this is the case, the land trust as a trustee will not be able to transfer the property unless it gets a variation on this requirement from the donor or a court. In another situation, if the property was certified and claimed as an ecologically sensitive land donation for income tax purposes, the land trust must obtain the permission of Environment Canada to transfer ownership in the property or face a substantial penalty; (see Section 4.2.4).

2.5.4 Donations

Fee simple donation may involve the donation of all or part of a property. Donors are generally interested in receiving a tax receipt for such donations to use against their taxable income. Creative arrangements such as donation of a conservation easement, donation with lease or sale-back, donation with a retained life interest or bequest are discussed in detail later in this part of the manual. In most cases, the land trust will want to have the donor sign a Letter of Intent before progressing into detailed negotiations and incurring expenses (see a further discussion of this process in Section 3.4 and the sample Letters of Intent in Appendix 2H).

The value of the land for purposes of issuing a charitable tax receipt is determined by

an accredited third-party appraiser. A third-party appraisal is required by Revenue Canada for both the donor and the charity to substantiate the value of the gift. Revenue Canada has established guidelines for what constitutes a gift and other requirements. (See Section 4.2).

Infrequently, donors approach a land trust with land which has limited, or no, conservation value. Such donors may only be interested in the associated tax benefit of the donation, and not have a personal tie to the land. In such cases, the donor may be agreeable to the land trust selling the land and using the proceeds to acquire or manage other important lands. The land trust will want to clearly document that the donor is prepared to have the lands sold and preferably have the donor sign a Letter of Intent to Donate Trade Lands (see the example in Appendix 2H). Care should be taken in assessing such donations, as the donors may not have marketable title (e.g., there are liens, environmental problems, etc.) or may have been marketing the property for years without offers. Trade lands should generally not be certified as an ecological gift (they do not meet the criteria and disposition requires Environment Canada's approval) and the implications of existing programs concerning the land (property tax incentive enrollment or management agreements) or other limitations need to be fully explored. Unless the land trust wants to place an easement on the property before it is sold, often it is simpler to request that the donor sell the land first and donate the proceeds to the land trust.

Although money isn't necessary to acquire fee simple donated land, associated costs such as legal, survey, appraisals, long-term stewardship, etc., have to be covered. A land trust's preferred approach is to offer to pay for costs associated with the donation of land, although donors are asked to assist with these costs if possible. Donors who may be in a position to provide funds to the land trust may be directed to individuals with knowledge of planned giving options. For example, a cash contribution by way of a gift annuity, life insurance policy, or bequest may provide increased benefit to both the donor and the land trust.

A land trust's board may wish to approve guidelines for the acceptance of property donations which will direct the land trust in reviewing and accepting gifts. Depending on the motivation of the donor, the gift may need to be certified as an ecological gift under the *Income Tax Act (Canada).* (For details of this process, see Section 4.2.4).

As with a fee simple purchase, if only a portion of the land is of interest to the land trust or the donor, the donation may require local government approval to create a new lot. Again, the land trust may arrange title in the name of a Crown agency or conservation authority partner to avoid the requirement to legally sever the lot through a formal planning process. However, as a matter of maintaining good relations with the local authorities and not limiting future transactions, planning issues and such approaches should still be discussed with the local municipality.

The key to successful completion of a donation is establishing an open, trusting relationship with the donor. This may require substantial time commitments from land

securement representatives to foster a relationship and work towards the completion of the donation. As such, a land trust generally should allow at least six to nine months to complete a donation, from the point of initial contact to transfer of title. In cases where the donation needs to be completed by the end of the tax year (December 31), unless the donors are highly motivated, the land trust should advise the potential donor of this general time frame[3].

2.5.5 Bequests by Will

A bequest allows an individual to leave property of any sort to the land trust through his or her will. There are several ways to provide a charitable bequest in a will, including:

- specific bequest: a gift of a specific dollar amount or a particular piece of property (either ecologically sensitive or trade land);
- residual bequest: a gift of the balance or part of the balance of the donor's estate after all debts, taxes, administrative expenses, and specific bequests have been paid;
- contingency bequest: a bequest which takes effect only in the event of the prior death of other named beneficiaries.

A bequest through a will can assist with the donor's estate planning process. As Revenue Canada deems donors to have disposed of all their assets at fair market value immediately prior to death, the donor's estate must pay tax on any capital gains on land. As such, there could be significant taxes owing upon one's death which will leave less money for the intended beneficiaries. However, bequests can generate a large tax credit for a donor's estate, which helps minimize taxes and preserve assets for beneficiaries. The tax limit for gifts made in the year of death and the immediately preceding taxation year is 100 per cent of the individual's net income ('Ecological Gifts' during one's lifetime have the same net income limit).

For sample bequest wording for gifts of land and money, refer to Appendix 2I.

2.6 **Creative Means to Transfer Title**

2.6.1 Transfers With Restrictions

A sale or other type of transfer of property title can be made in ways that do not transfer the entire "bundle of rights" for land. The transfer can involve a reservation of certain rights, or the Agreement of Purchase and Sale can specify the requirement to grant to a third party certain rights, such as a conservation easement or life interest. The *Land Titles Act* and *Registry Act* specify some of the kinds of reservations that can be made. Under the *Land Titles Act*, sections 118 and 119, the following types of restrictions may

[3] Generally the appraisal of a property takes 20-45 days, and title searches and preparation of documents, environmental assessments, etc., will require about a month to complete.

be placed on title:

- notice of an application for a transfer or charge (mortgage) must be sent to an address specified by the owner;
- the consent of some person(s), named by the owner, must be given to a transfer or charge;
- "some other matter or thing is done as is required by the registered owner and approved by the land registrar";
- "the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner";
- "or any other covenant running with or capable of being legally annexed to land".

Other types of reservations may have been made in the grant of land from the Crown, called the Crown patent, such as pine trees, road or shore allowances, the right to land a boat, etc. (see Part 1 for further discussion). Utilities, railroads and other interests may have special unregistered rights. These may or may not be still operative under the *Public Lands Act,* public utility or other statutes. An aboriginal right or treaty right may be applicable or in dispute, as well. All of these need to be investigated during a transaction.

Other common law conditions could be applied beyond these or other statutes. Some conditions could be made conditional upon other things happening, such as not complying with the conditions, and these would be subject to the complex real estate principle called the Rule Against Perpetuities.

2.6.2 Life Estates

A life interest allows the former landowner access to and use of the property after title has been conveyed to the land trust. Technically, the life interest is an "estate in land" that is retained by the landowner, but often the same effect is reached through a more specific agreement similar to a lease or licence. The agreement usually lasts for the lifetime of the former landowner or their family members and permits them to use, or continue living on, the land while the land trust retains title. A life interest agreement should contain provisions ensuring the land will be kept in its natural state (e.g., no trees are cut or removed) and that the licensee ensures no damage to the natural features (other than acts of nature) occurs for the duration of the agreement. It is also imperative that the agreement contain terms expressing that the licensee is responsible for the payment of all utilities, amenities and municipal taxes.

The terms and conditions of the life interest will depend on the situation. Generally, a life interest arrangement will be part of the initial negotiations to secure the land. There are at least two ways in which the financial aspects of a life interest may be designed. First, the owner will pay market rent for the life interest for a period of years[4]. Second, the

[4] The value of a life interest is generally determined based on the age of the owner and type of interest retained.

value of the purchase, or tax receipt, will be reduced to account for the value of the life interest over the period it is utilized by the owner (or estimated using actuarial tables). If the property is a gift, the value of the gift is determined by a qualified appraiser through deducting from the market value of the property the value of the use of the life interest over the period of time the life interest holder is expected to live. In the case of fee simple donations of ecological gifts, the life interest *must* be approved by Environment Canada, the certifying authority. Refer to Section 4.2.4 for details.

A standard life interest agreement is found in Appendix 2J. A number of clauses should be contained within the life interest agreement. These provisions should be discussed up front with the owner during the negotiations process.

2.6.3 Bargain Sales

In some cases, owners may want to donate the land to the land trust, but are not in a financial position to donate it outright. A bargain sale with these owners may be an alternative. A “bargain sale” is one where a property is sold at a significantly lower price than it would be if placed on the open market. Generally, the transfer is seen to have two components: a sale for money, and a donation in exchange for a tax receipt. In the United States, this approach is streamlined into one transaction. In Canada, the process is somewhat more complicated but can still be accomplished within the bounds of the *Income Tax Act (Canada)*.

Understanding the owner’s motivation, and exploring creative arrangements, can often save the land trust significant sums of money. For example, some owners may need a percentage of the property value to pay off a loan or send their children to university. Other owners may be prepared to sell at less than appraised value to reduce capital gains tax payable, or as part of their estate or financial planning.

A bargain sale, sometimes called a “conservation purchase”, thus can be useful in several scenarios:

Scenario 1: The landowner agrees to sell the land at substantially less than fair market value.

Scenario 2: The property is owned jointly by two or more individuals, one or more of whom is prepared to donate their interest.

Scenario 3: The land trust purchases a property with the landowner voluntarily making a cash donation to the land trust after closing.

Note that only scenarios 2 and 3 provide a charitable tax benefit to the landowner.

Under scenario 1, the land trust’s offer would be accepted at less than fair market value. For example, a property appraised at $100,000 is sold by the landowner to the land trust for $75,000. There is no charitable gift from the landowner in this scenario,

although the sale at less than market value may reduce capital gains tax payable by the owner (refer to Section 4.2.2).

Under scenario 2, the property is owned by more than one individual. Some of the owners may be sympathetic to the land trust's mission, or in a financial position to make a charitable donation of their interest in the property. The remaining owner(s) may sell their interest in the land. The percentage ownership (e.g. 50/50, or 30/30/40) must be determined to substantiate both the purchase price and the value of the charitable donation(s).

Under scenario 3, the land trust would follow the process outlined in Section 3.4. The charitable cash donation can follow one of the three formats outlined below:

- a cash donation is made voluntarily by the vendor, after the sale has been completed;
- the vendor takes back a mortgage on the property, with the mortgage subsequently being voluntarily "forgiven" by the vendor, with the value of the mortgage considered a charitable donation; or
- a percentage of the property is purchased by the land trust in common tenancy and the remaining proportion held by the owner is then donated.

2.6.4 Conservation Buyers

Under a different scenario, a private individual interested in purchasing ecologically significant land, or a partial interest, for the purpose of conserving its natural features may approach the land trust. The land trust could recommend high-priority lands which will help fulfill the land trust's conservation mission and perhaps complement the land trust's nearby holdings. The "conservation buyer" would purchase the lands outright and then may just steward the property. The new owner could perhaps be encouraged to donate the fee simple ownership (soon afterwards or much later), a conservation easement or other interest to the land trust. Establishing a conservation buyer program may be an attractive option for many land trusts, particularly those that do not have large amounts of cash available to buy properties themselves.

If a property is donated to the land trust by a conservation buyer, an opinion of value must be provided by an accredited third-party appraiser to confirm that the donor's purchase price was reflective of fair market value. For example, a transaction in which a property with an appraised value of $100,000 was purchased for $1 million would not be reflective of market value, and a tax receipt would have to be issued at $100,000, the appraised market value.

2.6.5 Land Exchanges

Land exchanges are simply that: a trade of one or more parcels of land for other parcels of land. Sometimes a land trust can broker such arrangements even if it does not hold title in the process.

A land exchange may be useful where a landowner wishes to donate their own property, but it has less conservation value than a nearby parcel owned by someone else. Consolidating ownership of a contiguous series of parcels may be important for conservation purposes or for efficient management. In such a situation, a landowner of an interior lot may be willing to trade for an external property (which may have better attributes and fewer barriers for development). For conservation biology or access purposes, the elimination or creation of narrow lobes of property may be desirable and can be accomplished through a trade of one parcel for another. If the lot boundaries are to be reconfigured in the process, a severance and municipal consent may be required (see Section 5.5 on lot creation).

An agreement to trade lands may be very straightforward or can include complex arrangements. Ordinarily, the parcels involved are each assessed and the difference in value is either accounted for through a cash payment or through a similar process as for a bargain sale to allow for a donation of the difference and the issuing of a tax receipt.

2.6.6 Co-Ownership

As outlined in Section 1.1, land may be held in more than one person's hands. There are generally two forms of co-ownership: tenancy in common, and joint tenancy.

Tenancy in common means that each tenant (owner) holds a set proportion or share in the property, with each share being an undivided interest in the property which entitles the holder to possession of the whole (all the property belongs to all of the owners). The tenancy in common can be disposed of without the agreement of the other tenants and can be inherited. It is common for tenants in common to have an agreement among themselves as to what happens if one of them wants to dispose of their tenancy. For example, the agreement can specify that the other tenants have a right of first refusal to buy out the interest, the others must approve of a potential purchaser of the tenancy, or notice must be given before a sale or mortgage can be undertaken. A land trust could enter into a tenancy in common with others in order to: mutually finance a purchase (with unequal ownership reflecting the percentage contribution of funds), effect a bargain sale (see Section 2.6.3), or assume an interest in a property to influence its management and perhaps work towards a full title acquisition.

Joint tenancy is somewhat different because it provides that each owner has an identical share with all other owners. A joint tenancy can be terminated by mortgaging or selling the interest to another, ordinarily creating in the process a tenancy in common. If one joint tenant dies or releases their own interest, the other tenants automatically and immediately receive that tenant's share equally divided. Thus, a joint tenancy cannot be passed on in a will. Like a tenancy in common, each joint tenant has an undivided interest in the whole property.

2.6.7 Trusts

True trusts are an uncommonly used option for securing land. The most familiar trusts are financial trusts. In this section, we are more concerned with trusts concerning land where, for example, a land trust is given land to manage on certain terms on behalf of others or the community. A land trust could also be the beneficiary of lands held by others (such as another conservation organization or even the landowner). It is important to remember that “land trusts” are not usually true trusts in this sense, but are simply incorporated nonprofit charities informally entrusted by their communities and donors to conserve heritage properties.

For a trust to be created, the landowner gives title to the land to another person or organization (the “trustee”), or declares herself or himself to be a trustee, to hold and manage it on behalf of others. Thus the trustee holds title separately from those that are to benefit from the trust property. The rights and responsibilities of the trustees are set out in the trust instrument and generally it is the trustees who have the obligation to manage the land (and not the beneficiary, unless the terms of the trust say otherwise). The beneficiary can go to court to enforce the terms of the trust and trustees are held to a high level of responsibility. The written trust instrument describes the land, appoints one or more trustees, outlines the trust creator’s intention, and gives management instructions to the trustee. The instrument can specify how long the trust lasts (and what happens to the property when it does end) and whether the creator of the trust has reserved the right to revoke, or cancel, the trust. Those situations not set out in the trust instrument are governed by the *Trustee Act* and a variety of other legislation and court decisions.

Trusts can be set up while the creator of the trust is alive or through a will upon death. Sometimes a trust can be found by a court even though there was no explicit intention to set one up (e.g. a resulting or constructive trust); these types of trusts are beyond what can be covered in this section. The tax treatment of trusts is dependent upon many factors, including whether they can be revoked or are irrevocable. Obviously, trust arrangements, taxation and law can be very complex and thus anyone planning to set up a trust should seek legal advice early in the process.

2.6.8 Other Approaches

A variety of other approaches and combinations of land acquisition techniques can be employed in appropriate circumstances. While the possibilities are only limited by the imagination and any legal constraints, the tools discussed above are by far the most common in current usage. To go beyond these may well confuse landowners and even slow up some of their advisors. Nonetheless, necessity is the mother of invention. A few other techniques are noted below to point to some of the possibilities:

- the creation of a business or cooperative corporation or other organization in order to establish share ownership in a property;
- donating shares in a company that owns land, thus transferring all or a portion of

the land's ownership (this arrangement may also provide for a lower capital gains inclusion rate for publicly traded securities; see Section 4.2.2);
- relinquishing private rights to Crown or other public lands;
- acting as an agent for another organization, such as a government body, which has specialized authority or powers (for example, it is exempt from property taxation, qualifies for favourable income tax treatment, or does not require municipal land severance consents); and
- holding particular parcels or enforcing specialized subdivision, site plan or other agreements as part of a land development package, either independently or on behalf of a government or other body.

These are just a few of the options that land trusts and landowners may wish to consider to achieve conservation, financial and other goals. The discussion above is intended simply as an introduction, and decisions about land and taxes should be made only after careful consideration and professional consultation.

2.7 Additional Readings and References

Guide to Using Conservation Easements in Ontario, Ian Attridge, Ontario Heritage Foundation, Ontario Nature Trust Alliance, et al., Toronto, in preparation.

Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia, Barbara Findlay and Ann Hillyer, West Coast Environmental Law Research Foundation, Vancouver, 1994.

Creative Conservation: A Handbook for Ontario Land Trusts, Stewart Hilts and Ron Reid, Federation of Ontario Naturalists, Toronto, 1993.

Islands of Green: Natural Heritage Protection in Ontario, S. Hilts, M. Kirk and R. Reid, Natural Heritage League and the Ontario Heritage Foundation, Toronto, 1986.

"New Game in Town: Conservation Easements and Estate Planning", in: *Estates and Trusts Journal*, vol. 14, pp. 309-346, Susan Lieberman, 1995.

Protecting the Niagara Escarpment: A Citizen's Guide, Linda Pim, Richard Lindgren and Ian Attridge, Coalition on the Niagara Escarpment, Toronto, 1998.

Baseline Reporting for Natural Heritage Easements in Ontario, Jason Thorne, Ontario Heritage Foundation, 1997.

2.8 **List of Appendices**

The following are adapted primarily from the form of legal documents used by the Nature Conservancy of Canada, Ontario Region. However, examples have been taken from the Ontario Heritage Foundation, Ducks Unlimited Canada, and from other established conservation organizations.

These templates are not intended to be used directly in conducting a land securement transaction. A solicitor should review the forms and modify them to suit the requirements of the transaction and the land trust.

2A. Sample Agreement of Purchase and Sale

2B Sample Right of First Refusal

2C Sample Informal or Handshake Agreement

2D Sample Management Agreement

2E Sample Licence Agreement

2F Sample Lease Agreement

2G Annotated Model Conservation Easement

2H Sample Letters of Intent to Donate
- Sample Letter of Intent to Donate - Fee Simple Interest
- Sample Letter of Intent to Donate - Conservation Easement
- Sample Letter of Intent to Donate - Trade Land

2I Sample Bequest Wording

2J Sample Life Interest (Estate) Agreement