

PART 3 - SECUREMENT PROCESS

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SECUREMENT PROCESS

3.1 Introduction

The world of real estate purchases—with its own terminology, problems and cast of characters—may be intimidating to the board and members of a nonprofit land trust. This manual describes some of the basic terminology, the process and the issues in a typical real estate transaction. The role of surveyors, lawyers, planners and property appraisers is also considered. Reading this manual will not make you an expert by any means, but will provide you with:

- an introduction to basic concepts and principles;
- a general strategic approach to real estate projects and issues; and
- suggestions on when the expert assistance of the various real estate professionals is required.

Section 3.4 of this manual sets out a “typical” process for the donation of a conservation easement and for the purchase of a fee simple title. In reality, events will seldom unfold according to any such predictable script, and you will require a large degree of flexibility and common sense, including the sense to ask for help when you need it. Ideally, the board and membership of your land trust will include individuals qualified as real estate agents, lawyers, accountants, surveyors, planners or appraisers who will be able to provide experienced and practical guidance along the way.

3.2 Policies

Ontario Land Trust Alliance Statement of Land Trust Standards and Practices are applicable to the acquisition of real estate. The standards 8, 11 and 13 are reproduced here for convenient reference:

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

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

Standard 13: Board Approval of Transactions: *The board is responsible for every land transaction.*

In addition to broad direction provided by the standards, each land trust should have by-laws, policies and procedures in place to govern the actions of its directors, volunteers and staff in dealing with real estate agreements.

At a minimum, the land-trust by-laws and procedures should specify precisely which directors and which staff or volunteers, if any, will have authority to sign binding real

estate agreements on behalf of the land trust. In addition, where real estate transactions or purchases require the expenditure of funds or fundraising, the land trust should have policies in place to ensure that any such transactions be made conditional on securement of the necessary funding, or be made conditional on board approval. The policies also provide a framework for board consideration of each transaction, consistent with standard No. 13, as reproduced above.

Standard No. 8, respecting the selective protection of lands, is addressed in more detail in Section 3.3. The written priorities and criteria for land acquisition developed by the land trust should be specifically referenced in the policies developed for the selection and approval of acquisition projects. Those criteria will ensure the land trust does not find itself committed to long-term ownership and management obligations for properties that do not contribute significantly to the trust's goals.

The trust's policies for real estate acquisition should also ensure an environmental audit or assessment be completed to identify potential environmental contamination and liability. See Section 3.7 below, and Appendix 3A for a description of environmental audit requirements and a sample form from the Nature Conservancy of Canada.

Policies may also address the standard requirements for legal opinions on title and for appraisals. In some circumstances an appraisal may not be required or a less-detailed opinion letter on value may be acceptable. An example from the Nature Conservancy of Canada policy on appraisals or "Documentation of Value" is provided below. It has to be stressed that this is provided as an example only. Each land trust will have to develop its own policy considering its level of activity and experience and the qualifications of its staff, if any. In addition, the requirements of Revenue Canada with respect to charitable receipts will vary from time to time and must be considered. The Nature Conservancy of Canada policy is as follows:

- "For audit and accounting purposes, the fair market value of interests in land owned must be substantiated at the time of acquisition by The Nature Conservancy of Canada. All acquisitions of property must have a documentation of value from an accredited third party according to the following policy:
- i) all property donations where a charitable tax receipt is to be issued, including easements, covenants and servitudes, shall be substantiated by an accredited AACI appraiser;
 - ii) where the purchase price or donation value is likely to exceed One Million Dollars, value shall be substantiated by two independent accredited AACI appraisers;
 - iii) where the purchase price is likely to exceed \$25,000 value shall be substantiated by at least one accredited AACI appraiser;
 - iv) where purchase price is likely to be less than \$25,000 a letter of opinion from a local realtor is sufficient;
 - v) in multiple, ongoing, purchases value may be substantiated from historical values, so long as such values are confirmed annually, in writing, by the relevant authority outlined."

In addition to appraisal requirements and policies, each land trust should establish its own broader land securement process and checklist to ensure that relevant legal and policy concerns are addressed at the appropriate time.

3.3 Acquisition Criteria and Priorities

Land acquisition and ownership requires a major investment of land-trust resources, including staff and volunteer time, acquisition costs and long-term management obligations. Since these human and financial resources are limited, the land trust should be judicious in the properties it chooses to protect. The land trust will want to ensure that its scarce resources are available for priority projects and that resources are not committed unnecessarily to the acquisition, ownership and management of parcels that may only add marginally to its objectives. To proceed *ad hoc*, accepting any properties that are offered, may mean that important opportunities to protect more significant sites are not identified or are lost.

The land trust should have a clear written statement of its priorities and criteria for land protection. Ideally, those criteria should be established in the context of a systematic study of land resources and opportunities in the geographic area of interest. These should be developed by each land trust based upon its corporate goals, whether for the protection of ecological, open space, scenic, heritage or other values. There are many excellent precedents for developing such a set of land acquisition criteria and a broader “land conservation strategy. Appendix 3B and 3C of this manual contains examples of land acquisition criteria from the Nature Conservancy of Canada and from the Rideau Waterway Land Trust. For guidance on developing a broader conservation strategy, see the Adirondack Land Trust handbook *Developing a Land Conservation Strategy*, or see *Natural Heritage Action Plan* from the Couchiching Conservancy.

Not only will an intelligent conservation strategy with priorities and criteria for acquisition make best use of available resources, it should also assist in fundraising. Donors will likely have more confidence in contributing to a responsible organization that has clear priorities for the use of resources, than to the latest *ad hoc* opportunity for acquisition.

Purchase vs. Donation

In addition to the physical landscape and ecological criteria, there will be other practical considerations. For example, the land trust may establish different, more stringent criteria for the purchase of land, as compared with the acceptance of donations. Presumably, only the highest priority lands will qualify for the expenditure of purchase funds.

Donation and Ecological Gift Criteria

If the property is a donation and if an income tax receipt is required, then it will be important to determine whether the gift and the property qualify under the “ecological gift” criteria of the *Income Tax Act* described in Section 4.2.4 of this manual.

Long-Term Management Liability

Is the donor or some other party prepared to provide funding for the long-term management of the property? Is the donor prepared to provide an endowment fund for that purpose? A woodlot adjacent to a recreational boat launch and picnic site may be an attractive and high-profile acquisition. However, recreational land use, whether authorized or not, may require a high level of monitoring and maintenance. If at the same time, the site does not rank significantly in the objectives or criteria of the land trust, and if the donor is not willing to contribute to long-term management liabilities, then the prudent decision may be to decline the offer of donation.

Is it a Threatened or Scarce Resource?

Where there is virtually no threat from changing land use in the area, the commitment of land-trust resources to securing a conservation easement or ownership may not be justified.

Alternate Planning or Regulatory Protection

In addition to considering the degree of threat, it may be appropriate to consider the degree of protection already provided by provincial and municipal policy, planning and regulation. For example, development in valley flood plains may already be prohibited by conservation authority regulations in Ontario. Does the significance of the valley's natural resources justify the additional effort of the land trust to negotiate and monitor a conservation easement? Wetlands may be protected by the Provincial Policy Statement, the municipal Official Plan and the implementing zoning regulations. As described in Part 5 of the manual, it is important for land-trust officers to understand that their decisions on protection strategies and options are made in the context of broader municipal land-use planning. The trust's protection efforts will be most effective when they are coordinated with, or at least appreciative of, the level of protection available through municipal planning.

As just one general example, a provincially significant wetland may already enjoy a level of regulatory protection. However, a conservation easement over the upland buffer area adjacent to the wetland might provide an enhanced level of protection not guaranteed or permanently secured by the Provincial Policy Statement and municipal zoning.

Trade Lands

Land that might not otherwise qualify for acquisition may be accepted as "trade land" to be sold, with the proceeds of sale committed to securing higher priority lands.

Short-Term and Long-Run Community Relations

There is a tendency for new land-trust organizations to leap at the opportunity to acquire their first property or conservation easement. To some degree there is a legitimate need to establish a track record, experience and credibility. However, a land trust that continues to haphazardly acquire land interests will likely erode its own capacity and credibility in the long run. Land trusts are urged to develop, as soon as possible, acquisition priorities and criteria in the context of the trust's corporate and charitable objects. In most cases there will already be a great deal of supporting information and mapping available through municipal plans and conservation agencies on the

geographic distribution of natural areas and resources. As suggested above, the trust's conservation strategy will be most effective if it is thoughtfully developed in cooperation with, or at least in consideration of, the provincial and municipal planning framework. In the long run that will lend credibility to all of the trust's efforts toward community support, fundraising and land securement.

3.4 Acquisition Process

Two scenarios are set out in this section. The first is the donation of a conservation easement and the second is the purchase of a fee simple title. While it is possible, of course, that an easement would be purchased or that a fee title would be donated, the securement processes outlined here are intended to provide sufficient guidance to assist with any of these situations.

3.4.1 Donation of a Conservation Easement: Doing the Deal Step-by-Step

Below are suggested steps in the negotiation and acceptance of the donation of a conservation easement. While not every detail can be identified or anticipated here, the steps should be helpful in identifying the main areas of concern.

Step 1: Assess the Natural Resources of the Land

An offer to donate a conservation easement will normally be initiated by the landowner. However, after the initial enquiry and even before meeting with a landowner, the land-trust representatives should compile background information about the property. Information on the natural values of the area or the site may be available "off the shelf" from municipal planning background reports, from the conservation authority, or from the land trust's conservation strategy planning exercise. As well, discussions with local naturalists, county clerks and planning staff are useful in understanding the natural values and development potential of the lands in question. Information on land values for similar properties, sales, or conservation transactions will also be helpful and could be prepared in advance of meeting with the landowner.

As outlined in Section 3.3 above, the land trust should have established clear written priorities and criteria for the acquisition of property interests. The land trust should be satisfied that those criteria will be met before fully committing time and financial resources to the project. In some cases it may not be immediately clear whether the property is worth protecting. In those cases, it will be important to advise the landowner of your criteria and to act to secure the additional information that will be required.

Step 2: **Identify the Goals of the Landowner**

In your meeting(s) with the landowner you will want to listen carefully to understand their objectives and concerns for the future ownership, use, and protection of the property. What motivates them to speak with you? What are their concerns? You will also want to be clear with the landowner about the nature of the land trust, its objectives and resources. Initially you need to answer a few basic questions:

- What does the landowner want for the future of the property?
- Can a conservation easement achieve the landowner's objectives?
- Is the land trust prepared to commit to the type of resource protection that the landowner is proposing?

Clearly, you will discuss the character of the land and the surrounding area and identify those natural values or habitats that deserve the protection of an easement agreement. Eventually, you will have to determine whether you and the landowner agree on what values and habitats are to be protected. In the first meeting with the landowner, you will also want to secure permission to walk the site.

Ask if the donor has discussed the donation with their family and tax and legal advisors. Strongly encourage the landowner to obtain independent legal and tax advice regarding their options. Suggest they do this before making a formal commitment. Ask the donor if they will require a tax receipt for the value of the donation.

If the donor is seeking a tax receipt, make sure they understand that an accredited third-party appraisal will be required to substantiate the value of the conservation easement. Be prepared to discuss property values, the landowner's expectations, and any knowledge or experience that you may have respecting the value of development rights, conservation easements or property in the area. There may be an opportunity early in your discussion to get a sense of whether the landowner's objectives are realistic. In rural areas without servicing or development potential, the value of a conservation easement may only be a small fraction of the value of the land. Landowners often believe their property has greater development potential (and therefore monetary value) than what is legally, or functionally, feasible. If the landowner wants to maximize the tax benefits of the donation, the land-trust representative should indicate clearly that the value of the donation of a conservation easement will be determined by an independent and qualified appraiser. In rural areas, the donation of a conservation easement would normally be valued at just a fraction of the total land value. If your land trust representatives are concerned that the donor's expectations may be too high, suggest that an appraisal be commissioned, with agreement that if the donor does not proceed with the gift, they will pay all, or a portion of, the appraisal costs.

The use of conservation easements may sometimes be proposed in the context of land development or subdivision approvals. If the conservation easement is already a condition of municipal planning approvals, it will not qualify as a charitable gift. Decide whether the owner's objectives for land use and tax receipt are reasonable and can be met by the land trust. If not, you may not want to proceed with the time and effort of subsequent steps.

Although you will be conducting a title search, you can also ask whether there are co-owners and confirm that the person you are dealing with either is the owner or has authority to negotiate on behalf of the owner(s). They may also be able to advise whether there are any mortgages, liens, or other encumbrances which could affect the negotiation and implementation of the conservation easement.

At the point that both parties are willing to commit to the process of negotiating and preparing the conservation easement, you may ask the donor for a commitment letter or a "letter of intent." This might occur after both parties have satisfied themselves in general that their objectives can be met, but before the land trust entirely commits its time and resources to negotiating and finalizing terms of the easement agreement. A sample letter of intent to donate a conservation easement is provided in Appendix 2H.

Throughout the subsequent process of negotiations and documentation, it will be important to stay in frequent personal or phone contact with the donor, to let them know how things are proceeding, to warn of delays that may arise, and to learn of any concerns they may raise.

Step 3: **Walk the Land and Compile Baseline Data**

With the permission of the landowner to inspect the property, you will be able to proceed with site visits and photographs. Ideally, the first site inspection should be with the landowner, who will be able, probably better than anyone else, to point out the boundaries, significant natural features, historic land uses and hazards, all of which will be important to developing a protection strategy for the site. The landowner may also be able to help with information on deeds, surveys, maps, air photos, and municipal zoning.

The information collected on the property will serve several purposes, including:

- preparation of the baseline documentation report, to provide a record of the current condition and habitat values on the property. Finalization of the report may continue up until the conservation agreement is signed and will provide a critical baseline for future

enforcement. The Ontario Heritage Foundation *document Baseline Reporting for Natural Heritage Easements* may be helpful.

- preparation of the acquisition proposal for approval by the land-trust board.
- input to the preliminary or Level I environmental audit. Section 3.7 provides a format for a standard environmental audit.
- preparation of a management plan for the long-term maintenance and care of the property.

Step 4: **Initiate Title Search**

As soon as it appears the donation is a real possibility for both parties, and before significant time and resources are invested in the property, it may be prudent to conduct a simple preliminary title search. A telephone call to a title searcher in the local registry office will allow you to request a basic report confirming the legal description and ownership, and to identify charges such as mortgages or existing easements that may be registered on title. The cost of this preliminary title search should be reasonable and will alert you early on to more significant issues that may require attention. You may learn, for example, that there are co-owners or other interests in the land that will be critical to negotiating and registering a conservation easement.

A more thorough review of the title and the other interests in the property can follow as required. Unlike a property purchase, the land trust may not be in a position to “requisition” the correction of title defects or deficiencies by the owner. However, in many cases there will be issues with respect to boundaries, surveys, mortgagees, or ownership that may be important to the effectiveness of the proposed conservation easement and that may take some time to resolve. Accordingly, these issues should be identified through the title search as early as possible.

Section 3.5 below provides a more detailed description of what may be involved in the title search.

Step 5: **Budget and Professional Services**

Determine the supporting professional services likely required, such as surveys, title searches, appraisals, environmental audit, legal and tax advice. Consulting a lawyer at this point may be helpful in determining the level of additional expert assistance, such as surveys, that may be required. Prepare a budget that may also include staff or volunteer travel, expenses and time. The budget should also anticipate the future costs of monitoring the conservation easement. Contribution to an enforcement

fund should also be considered. Finally, the costs of management planning, habitat restoration or improvement, and maintenance may also be relevant in cases where such activities are contemplated. Determine which services and costs will be to the account of the landowner.

Plan a budget for costs which may include:

- in advance of closing or registration: title report and advice, appraisal, survey, hazardous waste assessment, accountants, lawyer, travel and staff expenses, estimate of staff time;
- closing costs: land registry transfer fees and title insurance;
- future monitoring and enforcement and for habitat restoration or management obligations, if any.

Step 6: Land Trust Board Approval

Board approval or authorization will be required before proceeding with a land acquisition or conservation easement donation. A proposal for consideration by the board should provide sufficient information on the objectives of the landowner, the natural value of the property, the anticipated costs of acquisition, the costs of monitoring or management, and an analysis of how the acquisition will contribute to the objectives of the land trust.

Step 7: Negotiate the Terms of the Conservation Easement Agreement

Your negotiations with the landowner will have started with your first contact, and with your early efforts to reach mutual understanding on what each party hopes to accomplish. A cooperative personal or working relationship with the landowner will be tremendously helpful. Building that rapport and that relationship will be one of your first jobs. Remember that with a conservation easement, you and the landowner are entering into a long-term relationship. While that is an important consideration by itself, the quality of that relationship can also contribute to the land trust's reputation and to referrals in the community.

You will have to determine exactly who really owns and controls the land and who you really should be negotiating with. Where families, estates or mortgages are involved the ownership control may not be as simple as it first appears. The owner can also assist with information on the exact legal description, area and boundaries of the property. Although a preliminary title search is recommended, the owners may also be able to assist you with information on leases, mortgages or other encumbrances affecting the property.

The negotiation of a conservation easement will usually focus on the protective land-use restrictions to be applied to the property. There is a

temptation to apply all sorts of well-intentioned restrictions that may be environmentally desirable. However, the land trust should consider focusing upon those restrictions that are really critical to the protection of the site resources and that the land trust is prepared to enforce. For example, restrictions on hunting or on snowmobiles are easily included. However, those restrictions may be difficult to monitor or enforce and may not be essential to the protection of a wetland or woodlot, respectively. Similarly, on open space and agricultural land there may be a temptation to restrict the use of pesticides or agricultural chemicals. However, if the intention is primarily to maintain the land in agricultural production, it may be more prudent to allow the owners to operate within what would otherwise be characterized as sound agricultural practice. These are provided as hypothetical examples only. Of course, the flexibility and site-specific adaptability of conservation easements are one of their strengths, and land trusts are encouraged to thoughtfully address the individual requirements of each situation.

Step 8: Identify Due Diligence and Closing Requirements

To ensure nothing will be missed and that you will not be delayed at the last moment by the need for an appraisal, survey, legal opinion, *Planning Act* approval or other matter, compile a list of all requirements and deadlines, and assign clear responsibility to someone for each one. For a conservation easement, determine whether a survey or special mapping will be required to identify the areas subject to restrictions.

Determine if a survey or *Planning Act* consent might be required to allow registration against only part of the donor's land. If the donor has owned the lands for a substantial time, the original legal description (metes and bounds) may no longer be sufficient. Surveys take time to commission and complete, and could involve substantial costs for large, remote or topographically varied properties.

Step 9: Obtain an Appraisal

As a general rule, an appraisal will be required in support of any purchase or the issuance of a charitable receipt for a donation. In cases where the donor is not asking for a tax receipt, it may be appropriate to proceed without an appraisal.

Ensure the appraiser speaks with the donor to check that information about the property, which may not be found through their normal investigations, is available (e.g., building permits issued, third-party unregistered interests, etc.). Discuss the donor's motivation with the appraiser so that they are aware of any personal issues that may be revealed in their discussion with the donor (for example, the donor is making the gift in memory of a loved one). It may also be necessary to

brief the appraiser on issues surrounding the property's development potential, including municipal planning and zoning issues. If these issues are outside the expertise of the appraiser, some assistance from a professional planner may be recommended. Review the appraisal report with the appraiser before forwarding it to the donor. Carefully read the appraisal yourself to understand the calculations, the assumptions made, and the comparable sales used to establish the valuation. If you are concerned that the valuation may be significantly out of line, consider asking for "reality check," at least from a realtor familiar with the area.

A more detailed guide to commissioning and using appraisals is found in Section 4.1 of this manual.

Step 10: Ecological Certification

If the donor seeks a receipt for income tax purposes, it will usually be necessary to qualify the donation as an "ecological gift" as defined in the *Income Tax Act*. Ecological gifts are specifically defined as being "certified" for that purpose. (See Section 118.1 of the *Income Tax Act* for individuals and Section 110.1 for corporations). Information on how this information applies to donations of land in Ontario is contained in Section 4.2.4 and Appendices 4C, 4D and 4E.

If there are other issues of concern respecting the charitable donation, the donor or conservation organization may also consider obtaining a technical interpretation from staff at Revenue Canada.

Step 11: Postponement

If you have heard of first and second mortgages, you will have been introduced to the idea that the order in which interests are registered against title to land is extremely important in determining the priority and the ability to enforce those charges or interests in land. For example, a mortgage registered on title prior to registration of the conservation easement will have priority. The mortgagee could become the property owner through foreclosure or could sell the land under power of sale. Unless the mortgagee had signed a postponement, surrendering that priority to the conservation easement, then the mortgagee as owner would not be bound by the conservation easement. Similarly, a purchaser acquiring the land from the mortgagee under power of sale would not be bound by the conservation easement.

If you learn there are mortgages on title, you will want to approach the mortgagee, with the cooperation of the landowner, to request such a formal postponement. There may well be resistance if the conservation easement is perceived as reducing the property's market value. Often,

however, the effect on value may not be significant enough to prevent the mortgagee from cooperating, especially for rural lands.

Step 12: Finalize the Agreement, Execute and Register on Title

For convenience, the drafts of the easement agreement are often exchanged on short paper. The final version for execution and registration should be prepared on long, legal-size paper. The agreement may be executed on Sunday. Some people still recall that the *Lord's Day Act* had prohibited entering into contracts on Sunday. However, in 1985 the Supreme Court of Canada ruled that the *Lord's Day Act* was an unconstitutional infringement on the freedom of conscience and religion under the Canadian *Charter of Rights and Freedoms*.

As there may be maps, surveys, air photographs or other schedules attached to the conservation easement agreement, and since these documents and attachments may not always be acceptable for registration, you may approach the land registrar in advance and ask for a preliminary review on the acceptability for registration. This may be completed prior to execution by the parties to avoid the requirement of executing an amended or corrected conservation easement later.

For executing the conservation easement agreement by a corporate party or landowner, either a corporate seal or a statement by the signing officers that they have authority to bind the corporation must be provided. A typical form of signature block for the corporation would be as follows:

XYZ CORPORATION

Per: _____
Name: *Print name*
Title: President

I have authority to bind the corporation.

and:

Per: _____
Name: *Print second name*
Title: Vice President

I have authority to bind the corporation.

Your lawyer will prepare a land-transfer tax affidavit and a Document General required for registration purposes. An additional title sub-search may be conducted immediately prior to registration to ensure that there

are no new charges, mortgages, or encumbrances registered on title since the previous title search had been completed.

Obtain a complete set of the final documents for your own organization's records and arrange for safekeeping.

Step 13: Thank the Landowner and Publicize Your Achievement

To have reached this point will have involved a great deal of effort, good faith, and the generosity and dedication of the landowner. The landowner should be thanked and recognized. If the landowner does not object, the finalization of another property securement should also be used to publicize the achievements of your land trust and the opportunities for land conservation by other landowners.

Step 14: Initiate Plan for Easement Monitoring or Property Management

Once the easement is executed and registered on title, the land trust should initiate a management plan, which in some cases will involve little more than monitoring compliance with the conservation easement. Effective monitoring will usually require a baseline report as briefly described in Step 3, above. In other cases, active management for restoration or habitat improvement may be initiated. In either event, it will be desirable to provide the landowner with at least an annual report on your activities, especially as they affect that property, of course.

3.4.2 Property Purchase: Doing the Deal Step-by-Step

This section sets out guidelines for the basic steps in a typical land purchase. Of course, these are simply guidelines to help you identify the issues and tasks that will normally be necessary. You will find that every acquisition has unique problems that compel you to address those issues in a different way or in a different order than outlined here.

Step 1: Assess the Natural Resources of the Land

As discussed in Section 3.3, it is essential that the land conservation organization focus its time, money and community support upon acquisition projects that really contribute to long-term organizational objectives. Many more properties will be available for acquisition than your organization will want or can afford. The essential first step is to assess whether the property justifies not only the purchase price, but the commitment of your organization's effort and attention during the acquisition process and into the future as a landowner.

That assessment will depend upon the criteria and priorities established in advance by the land trust. If you are satisfied the property may qualify,

based upon the preliminary information available to you, then you should collect more detailed information confirming the property's characteristics and the probable costs of acquisition and ownership.

Before meeting with the landowner, the land-trust representatives should, whenever possible, compile background information about the property, including information that may be readily available from land titles, surveys deposited on title, municipal assessment, and zoning information. Additional information on the natural values of the area and the site may be available from municipal plans or from the land-trust conservation strategy planning exercise. Those planning exercises should have identified the key significant wetlands, woodlots, ANSIs and habitats of particular interest. As well, discussions with local naturalists, county clerks and planning staff are useful in understanding the natural values, land-use history and development potential of the lands in question.

In the first meeting with the landowner, you will want to secure permission to walk the site. Ideally, the landowner will agree to go with you and to share their intimate knowledge of its history, boundaries, hazards, natural and man-made features.

Step 2: **Identify the Goals of the Landowner**

A cooperative personal or working relationship with the landowner will be tremendously helpful. If you come to understand the goals of the landowner for compensation and for the future of the land, you will be in a much better position to come to an agreement that will best satisfy both parties. Anyone who has purchased a home will know that the character, interests, personal background, social contacts, current financial circumstances, and time constraints of the vendor may all be relevant to the success of your agreement. A successful transaction can even lead to a longer-term relationship contributing to your organization's reputation, referrals and community goodwill.

First you will have to determine exactly who really owns the land and who will control the sale. Where families, estates or mortgages are involved the ownership control may not be as simple as it first appears. At the same time you will need to determine the exact legal description, area and boundaries of the property. Although a preliminary title search is recommended, you may also learn from the owners, their lawyer or agent about liens, leases, easements or other encumbrances affecting the property.

Where the owner is an individual or a family, the conservation organization may be able to offer creative terms for sale, tenure and protection of conservation values that are tailor-made to the goals of both parties. There may also be opportunities for individualized agreement terms where

the owner is a land developer or corporation. Although corporate owners will typically be driven primarily by the need to maximize financial returns, there may also be some opportunity for creative conservation arrangements. These owners may, for example, be interested in public relations opportunities or community goodwill created by the protection of significant conservation or open space lands. Refer to Section 2 of this manual regarding the alternative methods of protection that may be available.

Where ownership is controlled by an estate trustee or a trustee in bankruptcy, there may be less room for creativity as the vendor may be obliged to simply seek a quick, simple, cash deal at the maximum sale price.

Whoever the owner may be, it will be important for the conservation purchaser to understand the owner's situation, motivation, constraints, and decision process if the matter is to move forward effectively to a successful conclusion.

It will also be important to explain early in the negotiation process that the land trust will be able to proceed with purchase only at the price determined by an independent qualified appraisal. Often landowners believe their property has greater development potential (and therefore monetary value) than what is legally or functionally feasible. By compiling background information, land-trust staff can establish the level of threat, land value and likelihood of other interested purchasers. A review of the vendor's property tax assessment may also be helpful in determining a base number for the purchase price, although until recently most tax assessments have not accurately reflected market value. Tax assessments will also help staff determine future stewardship costs, such as property taxes, that will become payable by the land trust. If the landowner is open to negotiation of a purchase agreement, then arrangements for an appraisal can be made, and the landowner will be requested to cooperate with the appraiser.

While many landowners will be motivated primarily by financial return, some may be interested in personal recognition, tax or financial planning benefits, or in maintaining the current use of the lands. These interests may provide an opportunity to acquire the land at less than market value, to reduce capital gains tax payable, or to proceed with a lease or sale-back arrangement. In exceptional circumstances, vendors may voluntarily donate back a portion of the purchase price as a charitable gift. See Section 2.6.3 for further information on bargain sales.

Know what funding, if any, may be available to purchase the land. Let the vendor know if the land trust will need time and an extended closing date to raise the funds to acquire the property.

Determine if a survey, or creation of a new lot, will be required. If the vendor has owned the lands for a substantial time, the original legal description (metes and bounds) may no longer be sufficient. Surveys take time to commission and complete, and could involve substantial costs for large, remote or topographically varied properties. If a new lot needs to be created, time may also be required to secure *Planning Act* approvals. The timing for closing may need adjustment to reflect these factors.

Step 3: Walk the Land and Compile Baseline Data

With the permission of the landowner to inspect the property, you will be able to proceed with site visits and photographs. Ideally, the first site inspection should be with the landowner who will be able, probably better than anyone else, to point out the boundaries, significant natural features, historic land uses, and hazards, all of which will be important to developing a protection strategy for the site. The landowner may also be able to help with information on deeds, surveys, maps, air photos and municipal zoning.

In the Trust for Public Land publication *Doing Deals - A Guide to Buying Land for Conservation*, a ten-point site inspection checklist is provided as follows:

“The critical things to look for include:

- *source of physical access to the property*
- *type, significance, and condition of conservation resources*
- *threats to the resource, both on-site and off-site, such as a “For Sale” sign on adjacent property*
- *existing land use and intensity of activity*
- *improvements (buildings and other structures) and their condition*
- *safety hazards, both natural and structural*
- *public use problems, such as a fence that clearly is broken down by trespassers*
- *evidence of hazardous waste problems both on the site and on adjacent property*
- *adjacent land use that might negatively affect the resource*
- *property boundaries”*

Record your inspection on a standard evaluation worksheet (see the Land Trust Alliance document *The Standards and Practices Guidebook*). Visit the property more than once. You will almost certainly see things that you did not see or record on the first visit.

The information collected on the property will serve several purposes, including:

- preparation of the acquisition proposal for approval by the land trust's board;
- input to the preliminary or Level I environmental audit. Section 3.7 provides a format for a standard environmental audit;
- preparation of a management plan for the long-term maintenance and care of the property.

Step 4: Appraisal

As noted above, a land trust will almost always be constrained not to pay significantly more than the appraised value of the property. Even in cases where donor commitments to funding might allow the land trust to pay a premium price, it may be prudent not to set such a precedent for future purchases.

In circumstances where the vendor's expectations for the purchase price may be too high, suggest that an appraisal be commissioned, with agreement that if the vendor does not proceed with the sale, they will pay all, or a portion of, the costs. An alternative is to present an Agreement of Purchase and Sale with an agreed price range (e.g., between \$100,000 and \$120,000), subject to the price being determined by an accredited third-party appraisal.

Ensure the appraiser speaks with the vendor to obtain information about the property which might not otherwise be available to the appraiser (such as previous purchase offers rejected, building permits issued, third-party unregistered interests). Review the appraisal report and discuss it with the appraiser before making a formal offer to purchase. Additional information on property appraisals is included in Section 4.1 of this manual and under Step 9 in Section 3.4.1 above.

Step 5: Prepare a Budget

The purchase price will normally be the most significant cost. Consider the time, staff effort and direct costs that also may be required to conduct and successfully complete the fundraising campaign.

Determine the supporting professional services likely to be required, such as surveys, title searches, appraisals, environmental audit, legal and tax advice. Prepare a budget that may also include staff travel, expenses and time. The budget should also anticipate future costs of any planned maintenance, management planning, restoration, or improvements for the subject lands. Determine which services and costs will be to the account of the landowner.

Plan a budget for costs which may include:

- fundraising campaign;
- in advance of closing or registration: title report and advice, appraisal, survey, hazardous waste assessment, accountants, lawyer, travel and staff expenses, estimate of staff time;
- closing costs: land registry transfer fees and title insurance;
- future ownership and management obligations: insurance, property taxes, property maintenance, restoration or improvements, management planning and monitoring costs.

If the agreement is for purchase of just a portion of the land, then a *Planning Act* consent may be required. If proceeding to purchase just part of the property by consent, a new reference plan prepared by a surveyor will normally be required to illustrate the boundaries of the new parcel. If the vendor has owned the lands for a long time, a survey could also be required simply to replace the original metes and bounds legal description. As mentioned above, surveys take time and can involve substantial costs. A *Planning Act* consent would also involve approval process time, application fees and possibly expert assistance from a planner, lawyer or surveyor.

Step 6: Land Trust Board Approval

Board approval or authorization will be required before proceeding with a land purchase. A purchase proposal should provide the board with sufficient information on the natural values of the property, the degree of threat, the appraised value, the anticipated costs of acquisition (including surveys, if any, and other professional services) and the long-term management issues and costs.

The board will also have to weigh the contribution the purchase will make to conservation objectives against the availability of land-trust resources. Will the purchase require a major fundraising effort? Is it an effort likely to succeed? Although this manual focuses on the technical acquisition issues, it can be acknowledged here that the effort to build community support and to raise funds for the purchase may be the single most important step of all.

Step 7: Negotiate the Agreement in Principle

In some cases—for example, dealing with a nonresident landowner—there may be minimum opportunity for face-to-face negotiation. Ideally, however, the land trust will have the opportunity to deal directly with the landowner or representative acting for the landowner. The land trust should welcome the opportunity to get to know the landowner and their objectives. Using a variety of flexible approaches, the land trust may be in

a position to act in cooperation with the landowner to achieve mutual objectives. Even when a vendor is determined to negotiate a fair market price, they may be interested in some of the benefits of dealing with the land trust. The land trust can offer the owner a real chance at long-term protection of cherished landscape features(s) or property. There is also the potential for tax receipts in the case of bargain sales. A land trust may also be able to bring flexible and unique approaches to the land purchase deal. For example, a purchase subject to a life estate may allow a vendor to continue to use and enjoy a recreational cottage on part of the property, after the balance of the land is secured for conservation (see the discussion on life estates in Sections 1.1.2 and 2.6.2 of this manual.). A normal market sale would not provide that type of flexible solution. In Ontario we have seen properties worth millions of dollars sold for conservation purposes using combinations of these approaches. We know that they can work and that they appeal to at least some landowners.

Once you have agreement in principle, the agreement must be committed to a formal written contract. That written agreement will be binding on both purchaser and vendor once signed. It is the critical document controlling the timing, the conditions, the ability to require completion of the sale, and the ability to walk away. Ask for your lawyer's input *before* you finalize that purchase agreement.

Outlined above is a process for live negotiations with the landowner. Of course, whether or not you have been able to negotiate with the owner on an agreement in principle, you are entitled to provide them with a written offer to purchase as described below.

Step 8: **Make the Formal Written Offer to Purchase**

The Ontario *Statute of Frauds* states that an agreement for the purchase and sale of land must be in writing. Accordingly, an oral agreement for the purchase of land will not be binding upon either party.

Make the formal written offer to purchase once the appraisal is complete. Avoid negotiations on the appraised value. If the vendor feels the appraisal is too low, suggest they commission a new appraisal, or have the existing appraisal reviewed by an accredited appraiser of their choosing. Costs of this appraisal can also be negotiated between the parties.

Keep the Offer to Purchase simple, but be prepared to negotiate revisions. For example, don't necessarily offer to provide a second or third deposit, or pay the vendor's legal or severance fees. These are points which may be negotiated if the vendor does not sign-off the first offer.

Make sure the closing date and timelines built into the Purchase Agreement are sufficient for internal purposes, such as final board approval and fundraising. Time will also be required for the due diligence process, including title search, environmental assessment, survey, and *Planning Act* approvals, if required.

If the time allowed for completing the transaction turns out to be insufficient, but the parties are proceeding in good faith to satisfy the conditions of purchase, then it may be possible to negotiate to extend the date for closing. However, this may be at the discretion of the landowner and they may not be prepared to cooperate if, for example, they have competing offers for the property.

Conditional Purchase or Option to Purchase

The written purchase offer and agreement may be made conditional upon the land trust be able to satisfy key requirements such as securing an acceptable appraisal or completing fundraising for the purchase. A conditional purchase agreement should be drafted so that the purchase agreement is cancelled and the deposit is returned to the land trust, if it advises the vendor that it has not been able to satisfy the conditions. There may also be circumstances in which you may offer to purchase an “option” on the property instead of a binding purchase agreement. For example, you may be concerned that you have not had time to complete an appraisal, that you may not be able to raise funds within the time permitted, or that the vendor will sell to someone else before you can finalize your purchase plans. An option gives you the opportunity to decide later to purchase the property at a predetermined price. (See Section 2.2.2 in this manual). It will be time-limited, so that, for example, you must decide whether to exercise the option by providing formal notice to the vendor within four months. In effect, the option allows you to take your time and to convert the option into a binding purchase agreement when and if you are prepared to do so.

If you do not exercise the option, the land trust will forfeit the option price which is retained by the landowner. If you do proceed with a purchase, the agreements can provide that the option price be used as a credit toward the purchase price. Options may buy the land trust valuable time to test the fundraising waters or to explore creative acquisition alternatives. During the option period the land trust controls the sale and conveyance of the land. The land trust must decide whether the risk of losing a particular property outweighs the risk of losing the price of the option.

Step 9: Due Diligence

Once the purchase agreement is finalized and signed by both parties, the land trust should carefully review the conditions of the agreement and the

due diligence requirements with their attorney. An agenda of these tasks and responsibilities should be prepared in writing, so that it will be clear who is responsible for the environmental audit, the title search, and all of the other items to be addressed prior to closing. That agenda will be developed in the context of the scheduled closing date. Do not leave everything till the last moment. Surveys, environmental audits, *Planning Act* approvals and other matters can all raise additional issues or take much longer than you had anticipated.

Preliminary identification of title, survey, land use, environmental, and other issues will have started at the very beginning of the purchase process when the land trust first expressed an interest in the property and began to gather additional information. The Agreement of Purchase and Sale (see Section 2 of the manual) should allow time to complete the investigation of these issues, and may set conditions allowing the land trust to back out of the purchase if it cannot be satisfied on issues such as title, zoning compliance, and environmental contamination. Your lawyer will prepare a list of “requisitions” to be delivered to the vendor’s lawyer seeking satisfaction on the issues identified in the title search and in related “off title” searches.

Additional information on the major due diligence considerations is provided in the manual, including:

- Title Search - Section 3.5;
- Survey - Section 3.6;
- Environmental Audit or Assessment - Section 3.7;
- *Planning Act* - Section 3.6 and Part 5.

Step 10: **Pay for the Land, Close and Register the Conveyance**

“Closing” the deal is the transfer or conveyance of title to the land trust that occurs when all of the conditions of the purchase agreement have been satisfied (or waived), the balance of the purchase price is delivered to the vendor, and all of the necessary documentation has been properly completed and executed. Although the lawyers acting for the purchaser and vendor will be responsible for ensuring all of the documentation is properly completed, it may be necessary for the land-trust staff to be intimately involved in keeping track of and satisfying the numerous details and technical requirements prior to closing.

More often than not, there will be last-minute glitches, surprises and problems that had not been anticipated. Do not be discouraged. Problems are normal. If you have been preparing and working diligently on the big-picture items identified at Step 9 above, a willing vendor and a determined land trust will usually be able to overcome these last-minute obstacles and complete the transaction.

Step 11: Thank the Vendor and Publicize Your Achievement

In most cases the land trust will not have been the only possible purchaser. It will be important to thank the landowners and vendors who were willing to work with the land trust and to have the land put into permanent protection. The purchase negotiations, due diligence and fundraising by the land trust may all have required the patience and cooperation of the landowner. The landowner should be thanked and recognized as appropriate. If the landowner does not object, the land trust should also use the purchase to publicize its achievements and the opportunities for land conservation by other landowners.

Step 12: Initiate Your Property Management Plan

Once the property purchase is completed and registered on title, the land trust should initiate the property management plan. The basic management issues should have been identified early in the purchase process when the property was first assessed and inspected. A preliminary management budget and plan may even have been prepared in advance of closing. Where appropriate, active management for restoration or habitat improvement may also now be initiated.

Preparation of a property management plan and associated issues are addressed in Section 6 of this manual.

3.5 Title Search

3.5.1 Legal Description

The title search will begin with the property's legal description. The description may be available from the owner, the owner's solicitor, from the survey of the property, or from an assessment for registry office. In the rural parts of Ontario where land trusts will conduct the majority of their business, the legal descriptions are based upon the original 100-acre or 200-acre township lots lying within concessions and townships. For example, the description may simply be the North Half of Lot 4, Concession 5, Township of Dunbar, County of Devon.

The original township lot may have been further divided as described in a "metes and bounds" description. In that case, a relatively simple parcel of land 100 feet by 200 feet might be described as:

Part of Lot 4, Concession 5, Township of Dunbar, County of Devon, more particularly described as follows:
Commencing at the northwest corner of Lot 4, Concession 5;
Thence south along the westerly boundary of Lot 4, a distance of 100 feet to a point;

Thence east in a straight line running parallel with a northerly boundary of Lot 4, a distance of 200 feet to a point;
Thence north in a straight line running parallel with the westerly boundary of Lot 4, a distance of 100 feet to a point in the northerly boundary of Lot 4;
Thence west along the northerly boundary of Lot 4, a distance of 200 feet to the point of commencement.

Metes and bounds descriptions including bearings and distances will often be much more complex. In any event, it should be possible to sketch the boundaries of the property as described in the metes and bounds description or to follow and confirm that description on an existing survey plan.

A survey or reference plan, if available, will usually be much simpler, clearer and more useful than the metes and bounds description. A reference plan prepared by a qualified land surveyor and deposited on title will usually identify areas of the subject lands as parts on the reference plan so that the legal description might be as follows:

Part of Lot 4, Concession 5, Township of Dunbar, in the County of Devon, more particularly described as Part 1 on Reference Plan 63R-4028.

It is important to distinguish a reference plan from a plan of subdivision. Unlike a plan of subdivision, the parts on a reference plan may not correspond to the parcels of land that can be separately conveyed or dealt with. The reference plan merely describes the land or parts of the land without any entitlement to separate conveyance, whereas the lots on a plan of subdivision can be separately conveyed. The Ontario *Planning Act* requires that the entire parcel of land or all of the abutting lands owned by one owner be dealt with together. Subject to exceptions identified in Section 50 of the *Planning Act*, no transfer of title to the land or of an interest in the land (such as an easement or a mortgage) can be conveyed unless the interest is conveyed with respect to the entire parcel or unless a consent or subdivision has been approved pursuant to the *Planning Act*. Once the lands are subject to a registered plan of subdivision the description will also change so that reference to the lot and subdivision plan number will be sufficient without reference to the original township lot and concession.

Lands in the Land Title system will be given a parcel and section number such as:

Parcel 20-1, Section 10M-544, being Lot 20, Plan 10M-773, Town of Devon, Regional Municipality of Northland.

Unlike our example, the parcel and section numbers will not always correspond to the lot and subdivision numbers in the plan of subdivision.

3.5.2 The Registry Title Search

For lands in the Registry system it will be necessary to search title for the forty years preceding the last conveyance. The title search will require a summary of all the documents and encumbrances affecting a title. Many lawyers will enlist a specialized title search firm to assist with the search of title in the local registry office. However, it will also be necessary to have the search reviewed by a solicitor in order to determine the relevant existing restrictions on title, the issues arising from encumbrances on title, and ultimately to have the lawyer provide an opinion on title to the property.

3.5.3 Searches Under the Land Titles Act

Searching title of lands under the Land Titles system is a considerably simpler exercise since the Land Titles system is a registry of the existing state of title and the searcher is entitled to rely on the fact that the person shown as owner on the register does in fact have good title to the property. There is no need to conduct the forty-year search or to produce a chain of title as required for Registry lands.

Lands are continually being transferred from the Registry system to the Land Titles system. Upon this “first registration,” interests such as easements and mortgages affecting the land will be noted on the first page of the parcel register.

While in general the state of title is guaranteed under the Land Titles system, there are exceptions, including claims by the Crown and *Planning Act* violations.

3.6 **Survey**

3.6.1 Survey of Existing Site Conditions

The title search described in Section 3.5 provides a description of the quality of the title and the existence of encumbrances on title. However, the physical extent of title and problems associated with the area, access, dimensions, and encroachments on the property will only conclusively be dealt with through a survey of the property. A survey in this context refers to a plan prepared by an Ontario Land Surveyor pursuant to the *Surveyor's Act* and the *Surveys Act* of Ontario.

Where an existing survey is not already available or where the survey is outdated, the expense of a new survey may be justified in identifying any one or more of the issues described below.

Area: If the purchase price is based on an appraised value per acre or if there are minimum acreage requirements, the precise area can only be confirmed by survey. Where the survey reveals a smaller than anticipated area, adjustment or renegotiation of the purchase price may be appropriate.

Boundaries: Many of the natural heritage properties dealt with in Ontario will have water boundaries on creeks, lakes, or wetlands. There may be shoreline road allowances, historic changes in water levels, erosion or accretion, any of which could be significant in redefining the boundaries of the subject lands.

Access: Especially in rural areas, it may be that the public road has not been constructed or located precisely within the original road allowance. In these circumstances, even though a property may appear to be accessible from the public road, the physical road or driveway connection between the property and the public road system may actually cross intervening private lands. Of course, accessibility is critical to the value and usability of the land and must be confirmed.

Dimensions: Property dimensions may be critical where there is an intention to sever part of the lands. For example, there may be circumstances in which a landowner is willing to sell the wetland portion of a property, while retaining an upland building site for private use. A survey may be essential to determine whether the retained and severed lots can comply with road frontage requirements and municipal zoning regulations.

Encroachments: Where property boundaries are poorly defined on the ground, it is not unusual to find that fences, access driveways, and even buildings have been constructed across property lines. Where a survey identifies an encroachment by the building of the adjoining landowner it will be open to the purchaser to require the vendor to ensure that the structure is removed and that the status of the title to that area of the property be clarified and confirmed.

Location of Existing Easements and Buildings: A survey will accurately illustrate the location of an existing utility easement over which a utility company may have the right to install facilities such as pipes or hydro lines and to remove vegetation. The extent of those easement rights may be critical to a decision on whether to proceed with acquisition. The location of existing buildings will assist in determining compliance with zoning regulations and in planning for the future use or disposition of those buildings.

3.6.2 The Surveyor's Real Property Report

An Ontario Land Surveyor's Real Property Report consists of two parts. The first is the map or plan illustrating the boundaries, fences, buildings, and other significant features together with the dimensions and area of the property and the location of abutting public roads. The second part is a written report (often included on the face of the plan) identifying the easements and encroachments. Site plans and building location plot plans prepared by engineers, builders, or others may often be produced to show building locations and property boundaries. However, those should not be relied upon to establish the extent of legal title.

3.6.3 Remedial Action

Where a survey identifies problems as identified above, a variety of solutions may be appropriate. Briefly, these may include:

Abatement in Purchase Price: Where a survey reveals that the area of the subject lands is less than anticipated, or where access, property dimensions, or easements mean the extent of title is less than originally anticipated, but the purchaser still wishes to proceed, then an abatement or reduction in the purchase price may be the appropriate solution.

Acknowledgments: Where adjacent landowners have located minor encroachments such as fences or agricultural land uses onto the subject lands, a simple written acknowledgement from the adjacent landowner may be sufficient to confirm ownership of the property. Note that additional written acknowledgements may be required in the future to ensure that the adjacent landowner does not establish a claim for adverse possession (commonly referred to as squatter's rights) on the subject lands. Where the encroachments are more significant, such as a building located across the property line, a more permanent solution may be called for, such as an adjustment to the property boundary.

Planning Act Application: If it is necessary to convey part of the property from one landowner to an adjacent landowner in order to correct an encroachment or other boundary issue, a consent pursuant to the *Planning Act* will be normally required. If a survey has identified the issue in advance of closing, then the vendor should require the purchaser to complete the *Planning Act* approval process at the expense of the vendor prior to closing.

Minor Variance Application: Municipal zoning by-laws set out detailed regulations for minimum road frontage requirements, minimum lot areas, building setbacks from property lines, and many other regulations. Where a survey reveals breaches of those zoning regulations, it may be necessary to submit an application for a minor variance to legalize the deviation from the provisions of the zoning by-law. If the lot and building existed prior to the zoning by-law, then it may qualify as a "legal nonconforming use" and the municipality will not enforce the provisions of the by-law against the property. However, if there is an existing infringement or breach of the zoning regulations, then it may be appropriate to submit a minor variance application to the municipal committee of adjustment. Again, this application should be completed in advance of closing and at the expense of the vendor.

Extend Closing: Where problems identified by the survey require more complex solutions such as minor variance or *Planning Act* consent applications, an extension to the closing date may be appropriate or necessary. Additional remedies to deal with boundary and encroachment issues may be identified with advice from your solicitor.

3.6.4 Reference Plans

The Surveyor's Real Property Report described above relates to existing property conditions. In some circumstances, the transaction will involve the creation of new boundaries or areas. For example, where an owner intends to retain a portion of the lot

for private use, the *Planning Act* consent and severance will normally require a Reference Plan in order to accurately define the new lot boundaries.

When a conservation easement establishes zones for different levels of restrictions on the property, such as an agricultural area and a wetland protection area, then a Reference Plan may also be required to accurately identify the boundary between those zones. Conservation easements can refer to a more informal map, air photograph or other description of the restricted areas. However, a Reference Plan prepared by an Ontario Land Surveyor will provide the highest level of certainty and reliability in defining those boundaries in the future. This will be especially relevant to any enforcement action that may be required.

Finally, a Reference Plan may also be advisable or even necessary where the existing (metes and bounds) property description has become too complex, confusing, or unclear.

3.7 Environmental Assessment or Audit

It is common to view real estate as a valuable asset. Especially when land is offered by way of a gift, there is a natural inclination to accept the gift and to be enriched by this new acquisition. However, real estate can also involve liabilities with respect to taxation and management responsibilities. The potential for environmental contamination and concerns is another possible source of liability that must be addressed in advance of any acquisition or the acceptance of any gift of land. Forestry, agriculture, commercial, mining and waste disposal activities in rural areas can all result in significant environmental contamination on rural lands. It is essential those concerns be identified in advance of deciding whether to finally proceed with any land acquisition. Even if the source of contamination was created by a previous owner, the new owner or land conservation organization may be found responsible for cleanup costs or be subject to an order under the *Environmental Protection Act* for cleanup of environmental contamination.

The agreement of purchase and sale is one of the first lines of defence against environmental liability. It should provide for:

- (i) right to inspect the property;
- (ii) a review of environmental records;
- (iii) termination of the agreement in the event that an unsatisfactory level of environmental concerns are identified;
- (iv) a representation from the owner/vendor that the property is not currently contaminated and that there has been no use of the property that would result in contamination;
- (v) clear identification of whether the owner or the purchaser will be responsible for the costs of environmental audits and cleanup, if required; and
- (vi) a landowner's agreement to indemnify the land trust if costs or liabilities result from existing contamination of the property.

Once an agreement to acquire the property has been entered into with the appropriate provisions for the property inspection and the condition with respect to environmental contamination, then the land trust can proceed with the Stage I or Level I assessment. This assessment can be completed by land-trust staff, representatives or board members who should be experienced in dealing with real estate, but who are not necessarily environmental experts or engineers. The Stage I assessment may be less formal than the name might imply. For example, on an isolated wilderness property, with no evidence of building construction, industrial or other potential sources of contamination, a physical site inspection and enquiries into historic land use may be sufficient to confirm there is no reasonable concern over environmental contamination. At a minimum there should be a detailed inspection of the property, a review of the historic land use and documentation respecting the property, and a report on the results. The report should be completed and signed and kept on record as an essential part of the due diligence.

As an example, a form of the thorough Stage 1 assessment report used by the Nature Conservancy of Canada is provided in Appendix 3A.

If environmental concerns are identified in the Stage 1 assessment, then it may be necessary to proceed to a Stage II assessment, which involves retaining expert professional assistance to complete an investigation which might, for example, include soil sampling or water sampling to identify with greater precision the character and extent of the contamination and the measures and costs of remediation.

3.8 References

In preparing this part of the manual, we have relied heavily upon existing texts and materials, including in particular those listed below:

Doing Deals A Guide to Buying Land for Conservation, the Trust for Public Land, published by the Land Trust Alliance and The Trust for Public Land, 1995.

Developing a Land Conservation Strategy; A Handbook for Land Trusts Adirondack Land Trust, May 1987.

Model Conservation Easement and Historic Preservation Easement, 1996 (Revised easements and commentary from *The Conservation Easement Handbook*) Thomas S. Barrett and Stefan Nagel, Land Trust Alliance, 1996.

Conservation Easement Guide for Alberta Arlene Kwasniak, Environmental Law Centre, Edmonton, Alberta, 1997.

Land Trust Alliance Rally 1997, Workbook and Resource Materials.

3.9 List of Appendices

3A Nature Conservancy of Canada
Environmental Audit Form

3B Nature Conservancy of Canada
Guidelines for Review and Acceptance of Property Donations

3C Rideau Waterway Land Trust
Site Assessment Criteria