



Land Securement Manual

Revised September 2003



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Ontario Land Trust Alliance
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It is the hope of all those involved in the production of this manual that it will lead to many more hectares of natural areas protected by Ontario Land Trust Alliance member group

Part 1

Real Estate Basics

By Paul Peterson

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PART 1 - REAL ESTATE BASICS

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REAL ESTATE BASICS

1.1 Ownership Concepts and Interests in Land

Ownership of land may include the right to possess, occupy, use or enjoy the land. Ownership will normally also include the right to remove the resources, the right to exclude others and the right to transfer the interest(s) in the land by sale, lease or gift. These rights and interests in land may be divided between different owners. For example, the “landowner” may rent agricultural land to a neighbouring farmer, sell exclusive timber harvesting rights to a logger, or grant a right-of-way across the land in favour of an adjacent landowner. As will be discussed in subsequent sections, the landowner may also create restrictions on the use of the land, such as conservation easements, which when properly registered will bind subsequent owners of the land.

1.1.1 Fee Simple

When people speak of “owning land,” they are normally referring to the legal “fee simple” interest in land. The law recognizes “fee simple” as the most comprehensive interest in land for private individuals and corporations, and is as close as possible to absolute ownership. It is subject to the right of the government to levy taxes, regulate uses, and to expropriate where justified. Other interests in land such as leases, covenants and easements are lesser or partial interests in land that are taken out of, or away from, the fee simple interest.

The owner of the fee simple is entitled to dispose of the land or any interest in the land as they see fit, subject in Ontario to the restrictions of the *Planning Act*. At death the land can be conveyed pursuant to a will or without a will (by intestate succession). The fee simple can continue indefinitely through successive ownership transfers and through the generations. However, if the owner dies without heirs, the title may revert (or “escheat” in legal terms) to the Crown.

The owner of the fee simple title generally has the right to use the land anyway they choose. However, land use may be restricted by various government regulations such as Conservation Authority flood plain regulations, by zoning under the *Planning Act*, by environmental protection legislation, and by common-law limitations on harm caused to abutting lands.

1.1.2 Life Estate

As indicated above, the fee simple can continue indefinitely through the generations and through ownership transfers. A “life estate,” on the other hand, is a time-limited estate in land. The limit is usually the lifespan of the person possessing the property. In land conservation practice, a landowner or donor could transfer title to a land trust while reserving to themselves a life estate, allowing them to continue to live on the property, or to use and enjoy it until their death. The land trust would only be entitled to exclusive

possession of the property upon the death of the grantor. The duration of the life estate could also be measured by the life of another person, such as a child or relative.

The landowner or donor can achieve a result similar to the life estate by having the land trust accept title to the property while providing a lease back to the donor or grantor. These protection alternatives are discussed in more detail in Parts 2 and 3 of this manual. They are outlined here only to illustrate the meaning and possible use of the life estate.

During the term of the life estate, the previous owner may have the right to collect rents or crops or other products from the land, in addition to the right to enjoy the property. They will normally be obliged to maintain the property, insure it and pay the taxes. They should also be obliged not to injure, despoil or waste the resources on the land to the detriment of the future owner or conservation organization.

1.1.3 Leasehold Interest

A lease or a rental agreement governs the relationship between landlord and tenant and creates an interest in land, but only for a fixed period of time. During the term of the lease, the tenant usually has the right to the exclusive possession of the land. A lease will normally expire at the end of its term, although it may expire by notice from the landlord or as specified in the lease agreement.

The tenant is normally entitled to “quiet enjoyment” of the leased property, meaning that they will not be substantially interfered with. The tenant, on the other hand, is obliged to pay rent. The tenant is not allowed to “commit waste,” meaning the tenant should not alter the land in an abusive or destructive manner.

Leases offer a great deal of flexibility because the terms of the lease and the covenants or promises made between landlord and tenant can be tailored to the specific situation.

1.1.4 Common Law Easements

An easement is a right allowing the owner of one piece of land to use or to restrict the use on another, separately owned piece of land. Rights-of-way are a common form of easement familiar to many people. The right-of-way entitles the owner of one parcel of land to use part of a neighbour's land for access. Language in the property deed will state that the first Parcel ‘A’ is conveyed “together with a right or easement to cross (part of) the other Parcel ‘B’”. Similarly, the deed for Parcel ‘B’ will state that it is “subject to a right or easement in favour of Parcel ‘A’ for access.” The deeds notify anyone purchasing these properties of the existence of the right-of-way and the purchasers are bound to respect it. Legally, the right-of-way is said to “run with the land.” This means it binds future landowners, but that it is not personal. When the owner of Parcel ‘A’ sells and moves away they do not personally retain the right to use Parcel ‘B’ for access.

In law, Parcel 'A' enjoys the benefit of the right-of-way or easement and is referred to as the dominant tenement. Parcel 'B' bears the burden or obligation (e.g. to permit access) and is referred to as the servient tenement. Two separately owned pieces of property are required: the dominant tenement which benefits from the easement, and the servient tenement which is burdened by it. These legal rules evolved historically, mainly through the British courts. This law arising from the decisions of judges is referred to as "common law," and can be contrasted with laws or statutes enacted by parliament.

A fundamental problem lies behind many of the issues reviewed in the land-law sections of this manual. Any two people or landowners can make an agreement between themselves. They may agree, for example, that one landowner will pay the other for use of an access driveway, a water well or a pasture field. That agreement may be a binding contract on the respective landowners. Sections 2 and 3 of this manual discuss management agreements, licences and other types of agreements that may bind parties entering into them. However, these agreements may not be binding if there is a change in ownership. Typically, such contracts will not restrict sales or transfers of the two parcels of land. The issue, then, is how to make agreements binding on subsequent owners of the two parcels of land. Historically, common law recognized that where the benefit and burden of an easement agreement was integral to the use and enjoyment of the land itself, there could be agreements that "ran with the land" and bound future owners. The requirement for two separate parcels of land, the dominant and servient tenements, was one of the most important requirements that evolved out of common law. Additional complex rules must be satisfied if the common-law easements are to be enforceable against future landowners.

More recently, it has been recognized that it would be expedient to have agreements (for conservation purposes) that could "run with the land" even if the historic criteria and requirements were not satisfied. Specific legislation was required to replace and overcome those common-law requirements and to allow the creation and enforcement of "conservation easements" even where the conservation body holding the easement does not own nearby benefiting land. That legislation, the *Conservation Land Act*, is described below in Section 1.1.6.

1.1.5 Restrictive Covenants

A covenant is simply a promise or a term of agreement, usually in a deed or other document affecting land. It may be an agreement that something is either done, shall be done or shall not be done. As with common-law easements, restrictive covenants may bind not only the original parties to the agreement but also future landowners if certain historic legal requirements are satisfied. Again, as with easements, there must be two pieces of property, the dominant tenement to receive the benefit of the restrictive covenant and the servient tenement to which the restriction is applied. There must be some relationship between the two pieces of property so that the restrictive covenant will clearly benefit the dominant tenement. Only negative or restrictive covenants are enforceable against future landowners.

Although easements and restrictive covenants appear to be quite similar, they arose from different historic origins. When common law was too strict and inflexible, citizens could appeal to the monarch and the courts of equity for assistance. Restrictive covenants evolved from the law of equity, legally independent of common law.

The complexity of legal rules governing easements and restrictive covenants prompted the Ontario government to enact special legislation to permit conservation easements. The new statute law under the 1994 amendments to the *Conservation Land Act* incorporates elements of both the old common-law easements (for example, for access to the lands) and restrictive covenants (for example, to prevent building development). The complex historic requirements, including the need to own benefiting land, are removed and replaced by the 1994 legislation.

In this and preceding parts the difficulty of using restrictive covenants and common law easements for conservation purposes has been briefly described. Section 1.1.6 will introduce the statutory rules that allow conservation organizations to use conservation easements (and covenants) without concern for the old common-law rules. However, despite the enactment of the *Conservation Land Act* amendments, traditional restrictive covenants and common-law easements may still be useful. For example, where a conservation organization or even a private landowner (a) does not qualify as a “conservation organization” as defined under the *Conservation Land Act*, and (b) owns lands that could benefit from the easement agreement, that landowner could secure an easement for access and a restrictive covenant. An individual or a private hunting club could, for example, enter into a combined restrictive covenant and common-law access easement over adjacent land to protect natural habitat values and to enhance the protection and use of their own property.

1.1.6 Statutory Easements

In 1994 the Province of Ontario enacted an amendment to the *Conservation Land Act* specifically to address the complex rules governing the old common-law easements and covenants and to permit conservation bodies, including non-government conservation organizations such as land trusts, to accept and acquire “conservation easements.” Legally, that legislation is now described as section 3 of the *Conservation Land Act*, R.S.O. 1990, c. C.28, as amended (or more specifically as amended by S.O. 1994, c.27, s 128. (1) and (2)).

Other statutes also authorize the creation of conservation easements by government agencies or other specific bodies. For instance, the Ontario Heritage Foundation, municipalities, and provincial government ministries and agencies rely on the *Ontario Heritage Act* and the *Ministry of Government Services Act* to obtain conservation easements. The *Agricultural Research Institute of Ontario Act* specifically provides for the creation of easements to protect agricultural lands, but has not to our knowledge been used to date.

All of these statutes have in common the elimination of the requirement for the ownership of adjacent land or a dominant tenement. They also eliminate the complex rules governing the enforceability of common-law easements and covenants against subsequent landowners.

These statutes differ in the scope of the purposes for which the easements can be acquired and in identifying the organizations that are capable of holding and enforcing the conservation easements against landowners. Only the *Conservation Land Act* authorizes non-government conservation organizations to acquire conservation easements directly.

The *Ontario Heritage Act* allows the acquisition of conservation easements by the Ontario Heritage Foundation and municipalities for a wide variety of purposes, including historic preservation. It also provides for the assignment of conservation easements from the Ontario Heritage Foundation to other bodies, including non-government land trusts. These provisions have been used, for example, on the Niagara Escarpment to transfer easements from the Ontario Heritage Foundation to the Bruce Trail Association.

Other statutes enabling government bodies to hold easements are listed in Section 2.4.2.

1.2 Title Records and Registration

Provincial government land registry offices provide a central and reliable system for recording the documents transferring ownership and interests in land. Two registration systems operate in Ontario. The registry system is older and operates in the first-settled southern parts of the province. The land titles system prevails in northern Ontario. The registry offices are gradually converting lands in southern Ontario from registry to the land titles system. Lands are also generally converted to the land titles system as they are developed by subdivision plan or condominium.

1.2.1 The Land Registry System

The registry system was originally based upon township surveys of lots and concessions. The land registry office simply compiles in a separate abstract book all the legal instruments or documents affecting the land title of each concession lot. When purchasing property under land registry, the purchaser must complete a review of the title abstract book and all of the relevant instruments and documents to establish that there is a good chain of title, that the vendor has the right to convey the property, and that the purchaser will be obtaining clear title. It is up to the title searcher to determine ownership and to identify encumbrances affecting title. The title search must go back forty years from the date of the search. If there are no conveyances of the land within the last forty years, the search must go back to the last registered conveyance. All relevant documents or instruments must be carefully examined to ensure there are no interests competing or conflicting with the rights of the registered owner.

1.2.2 The Land Titles System

In contrast to land registry, the land titles system provides an up-to-date statement respecting the land title and a comprehensive, up-to-date list of encumbrances still in effect. The government warrants that the title information is accurate and reliable and may compensate any party suffering a loss due to an error on the land titles records.

1.2.3 POLARIS

The Province of Ontario Land Registry Information System, or POLARIS, was initiated in the mid-1970s to simplify the registration and searching of title documents. The objectives include:

- development of an automated title record system, through the title index database;
- development of a property mapping system through the property mapping database;
- to make the registry and land titles systems more compatible.

Under POLARIS every property has an identifier number used to search the database. In 1999 more than half the land registry offices and approximately seventy percent of properties in Ontario had been converted or updated onto the POLARIS system.

1.3 **Crown Reservations**

In some cases (as suggested below) a review of the original Crown grant may be required to settle title issues. For example, the rights to the minerals beneath the surface may have been reserved to the Crown in the original Crown grant, and may not automatically be conveyed with the ownership of surface lands. Some reservations in the original Crown Patents, such as the reservation of all pine trees, have been released by subsequent legislation. A review of the Crown grant may also be helpful in cases where ownership of the land below the surface of a lake or river is an issue. Normally, the Crown owns the beds of navigable waters, but there are exceptions where the original grant may have specifically included the water bed.

1.4 **Title Insurance**

When buying land, the purchaser has to be careful the vendor really is in a position to provide clean, clear title. Mortgages, construction liens, easements or encroachments from adjacent buildings affecting the land may become the responsibility and problem of the new owner if title has not been properly checked before closing the purchase. Traditionally, purchasers have relied upon the advice and opinion of their solicitor to identify these problems and to provide an opinion on title. The risks inherent in

purchasing land are addressed first by the diligence and competence of the solicitor, and second by the right to sue the solicitor in the event of incompetence or negligence.

Title insurance is an alternative form of protection from the risks of defective title. If a purchaser of land or a mortgagee does not wish to rely solely on a solicitor's opinion of the title, they may purchase title insurance. In that case, the lawyer acting for the purchaser or mortgagee will give an opinion on title to the insurance company (usually based on fewer searches) and the insurance company issues a policy to the new owner or mortgagee or both. A landowner with a title insurance policy can make a claim against the insurance company if a title risk, specified in the policy, causes a loss, regardless of the source of the loss. The value of the insurance is completely dependent on the contractual terms of the policy, and especially the scope of the coverage and the exceptions from coverage. An owner's policy normally covers the title to the interest in land, any defect or encumbrance on title, and access to the land. Restricted coverage may be included for survey-related issues such as encroachments and boundary disputes.

Despite the availability of title insurance, it's normally prudent to have a lawyer review the title and to identify and advise on the significance of any boundary issues, encumbrances or restrictions on use affecting rural lands purchased for conservation purposes.

References

In preparing this summary of basic real estate concepts, we relied heavily upon existing texts and materials, including in particular those listed below:

Real Estate Practice in Ontario, 5th Edition, Donahue, D.J. and Quinn P.D. of Butterworths, 1995

Real Estate Reference Materials, Donald Thomson and Sidney Troister for the Law Society of Upper Canada, 39th Bar Admission Course Materials, 1997.

Anger and Honsberger Real Property, 2nd Edition by A.H. Oosterhoff and W.B. Rayner, Canada Law Book Inc., 1985

Part 2

Securement Options

By Ian Attridge

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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.*

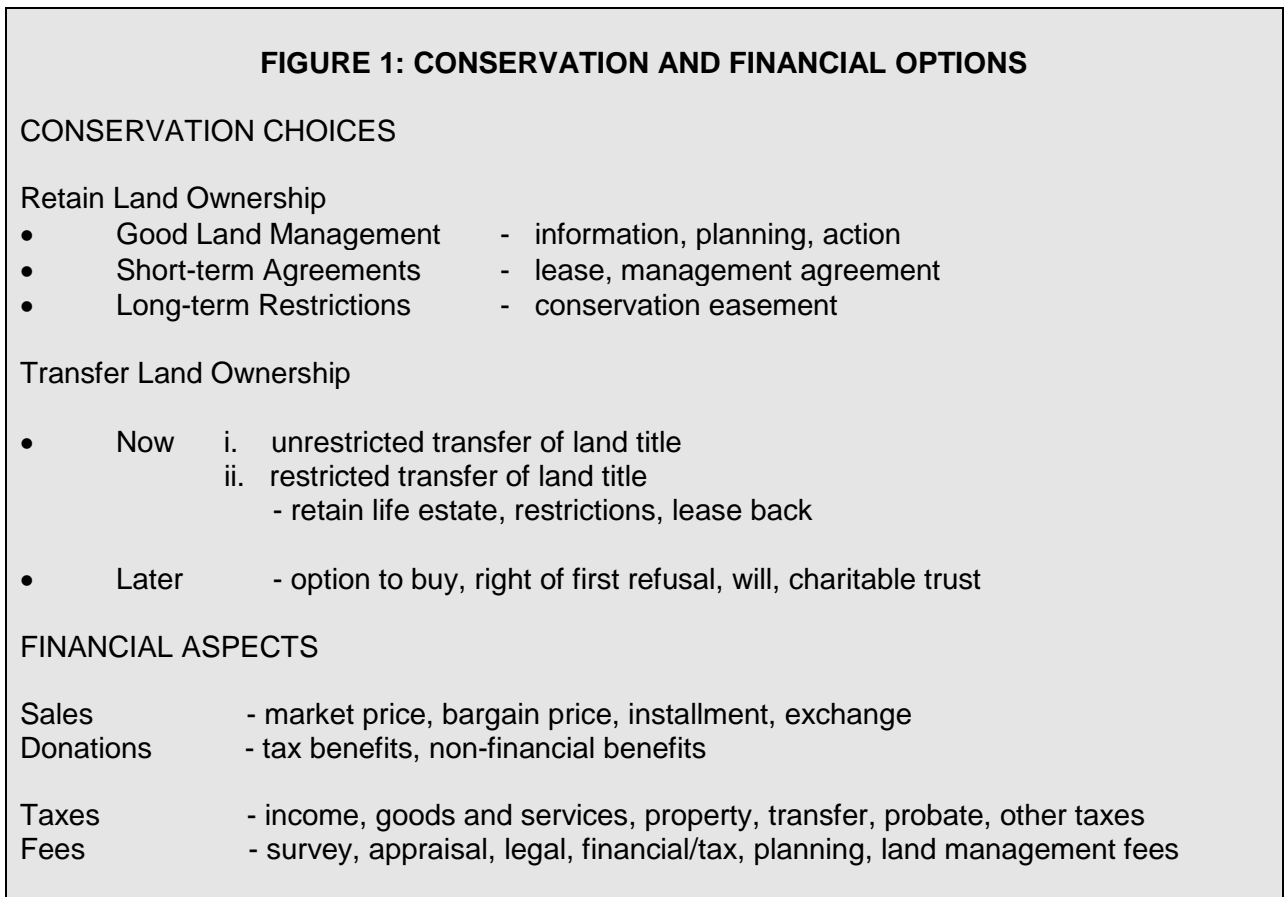
While there are a number of different techniques used by various conservation organizations, land trusts focus on using *on title* options to conserve lands. These options include: options and rights of first refusal; leases; conservation easements; different types of other agreements; fee simple purchases;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



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

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

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 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 easement². 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

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.

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

(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 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 frame³.

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).

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.

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 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 years⁴. Second, the 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.

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

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

Appendix 2A

THE NATURE CONSERVANCY OF CANADA AGREEMENT OF PURCHASE AND SALE

The Nature Conservancy of Canada ("Purchaser") agrees to purchase and _____
_____ ("Vendor") agrees to sell the following property ("real property") in _____
_____ described as _____
comprising _____ acres more or less on the following terms and conditions.

1. The purchase price shall be _____ Dollars (\$_____) payable as follows:
 - (a) a deposit of _____ Dollars (\$_____) payable by cheque herewith to _____;
 - (b) a deposit of \$_____ (being 5% of the purchase price) payable to _____ on the delivery to the Purchaser of this agreement duly accepted by the Vendor;
 - (c) the balance of the purchase price payable on closing to the Vendor by certified cheque subject to adjustments for realty taxes, public utilities and variation in the acreage of the real property, if any, determined by a survey if required.

The said deposits shall be held in trust pending closing or other termination of this agreement. The second deposit shall be placed in an interest bearing account or term deposit and the interest thereon shall be payable to the Purchaser on closing or on other termination of this agreement unless otherwise set out below. The deposits shall be credited to the purchase price on closing.

2. This agreement is subject to a condition in the Purchaser's favour that the Purchaser has obtained project approval from its Executive Committee and funding satisfactory to it within _____ (_____) days from the date of acceptance by the Vendor of this agreement. Failing such project approval and funding or the waiver of this condition by the Purchaser, this agreement shall be null and void and the deposits and the interest thereon (if any) shall be paid to the Purchaser.
3. The closing shall take place thirty (30) days after the fulfilment or waiver of the condition in paragraph 2 above. Vacant possession shall be given to the Purchaser on closing. The real property shall include any buildings and improvements thereon and there shall be included in the sale all chattels now on the property (which the Vendor covenants the Vendor owns).
4. The Purchaser shall have until ten (10) days prior to closing to investigate the title of the real property at its expense and to be satisfied that there is no breach of municipal or other governmental requirements affecting the real property and if within such time the Purchaser furnishes the Vendor in writing with any valid objection to title or any breach of municipal or other governmental requirement which the Vendor is unable or unwilling to remove, remedy or satisfy and which the Purchaser will not waive, this agreement, notwithstanding any intermediate acts or negotiations, shall be null and void and the deposits with all interest thereon shall be paid to the Purchaser.
5. Provided the title to the real property is good and free from all encumbrances, easements, licenses, rights of way and agreements (excluding this agreement) save as in this agreement otherwise specifically set out.
6. The Vendor shall deliver to the Purchaser on the acceptance of this agreement any survey in the Vendor's possession and all title deeds and abstracts or copies thereof, all of which shall be returned to the Vendor if the sale does not close. The Purchaser shall have the right to enter onto the real property for the purpose of obtaining an up-to-date survey thereof if required by the Purchaser and at the Purchaser's expense.

7. Until closing all buildings and improvements and chattels being conveyed hereunder shall remain at the Vendor's risk and the Vendor will hold all insurance policies on the real property and the proceeds thereof in trust for the parties hereto as their interests may appear. In the event of damage to the buildings, improvements and chattels before closing, the Purchaser may elect to take such proceeds and complete the purchase or cancel this agreement in which event the Purchaser shall be returned the deposits and all interest thereon.
8. The Vendor covenants and agrees that, during the term of this agreement or any extension thereof, the Vendor will do nothing which will or might damage or detract from the natural value or interest of the property. If at any time prior to closing, in the Purchaser's opinion, the natural value or interest of the property is destroyed or damaged by any cause whatsoever and to such an extent as to render the land of insufficient interest to the Purchaser, the Purchaser shall have the right to declare this agreement null and void and the deposits with all interest thereon (if any) shall be paid to the Purchaser.
9. The transfer/deed shall be prepared at the Vendor's expense in a form acceptable to the Purchaser and shall be engrossed as the Purchaser may in writing direct. It shall contain the statement of the Vendor and the Vendor's Solicitor under Section 50(22)(ii)(a) of the Planning Act, R.S.O. 1990 c.P.13.
10. The Vendor represents and warrants to the Purchaser (which warranty shall survive completion of the sale) that there is no waste, sewage, petroleum products, chemicals, tanks, drums or other foreign material or contaminants on or in the real property and the same has never been used as a waste disposal site. In addition, this agreement is subject to a condition in the Purchaser's favour that within thirty (30) days from the date of acceptance of this agreement the Purchaser's environmental assessment form has been completed to the Purchaser's satisfaction, failing such completion or waiver of this condition by the Purchaser this agreement shall be null and void and any deposits shall be paid to the Purchaser together with interest thereon (if any).
11. This agreement is effective only if the provisions of Section 50 of the Planning Act as amended are complied with. In the event that an Application For Consent to sever is required to be made to enable the Vendor to convey good title to the property, the Vendor shall appoint the Purchaser to act as agent and cooperate with the Purchaser fully in completing, submitting and supporting such Application which shall be made at the expense of the Purchaser.
12. The Vendor shall produce evidence on or before closing that the Vendor is not now and on closing will not be a non-resident of Canada under Section 116 of the Income Tax Act.
13. There is no representation, warranty, collateral agreement or condition affecting this agreement or the real property other than as herein set out. Any tender of documents or money may be made upon the parties or the Solicitor acting for the party on whom tender is desired and it is sufficient that a cheque certified by a chartered bank or trust company be tendered instead of cash. Time shall be of the essence hereof. This agreement shall be read with all changes of gender or number required by the context. Any schedule hereto shall be labeled Schedule "A" and shall form part of this agreement.
14. The Vendor warrants that spousal consent is not necessary to this transaction under the provisions of the Family Law Act, R.S.O. 1990 c.F.3, unless the Vendor's spouse has executed this agreement.
15. The Purchaser, upon satisfactory invoice within 30 days of closing, agrees to pay the Vendor's legal fees and disbursements up to a maximum of \$450.00 including G.S.T. having regard to actual time spent and disbursements incurred.
16. Acceptance of this Offer or any Counter-Offer may be made by either party by telefax or similar system reproducing the original with the necessary signatures and initials. Such acceptance shall be deemed to be made when the telefax is received by the party or his or her agent or Solicitor. The person sending such telefax shall immediately thereafter send or deliver the original to the receiver of the telefax for execution.
17. If this transaction is subject to Goods and Services Tax (G.S.T.) then such G.S.T. shall be in addition to and not included in the purchase price, and G.S.T. shall be collected and remitted in accordance with applicable legislation. If this transaction is not subject to G.S.T. , the Vendor agrees to provide on or before closing to the Purchaser or Purchaser's Solicitor a certificate in the form prescribed by the applicable legislation (if so

prescribed, or otherwise in a form reasonably satisfactory to the Purchaser or the Purchaser's Solicitor) certifying that the transaction is not subject to G.S.T.

18. This Offer is irrevocable by the Purchaser until 11:59 p.m. on the _____ day of _____ after which time, if not accepted, this Offer shall be null and void and the deposit shall be returned to the Purchaser without interest or deduction.

DATED at _____ this _____ day of _____.

THE NATURE CONSERVANCY OF CANADA

Witness

Per: _____

The Vendor hereby accepts this agreement this _____ day of _____, 19_____.

SIGNED, SEALED AND DELIVERED
in the presence of:

Witness

Per: _____

Name, address and telephone number
of Vendor's Solicitor:

Per: _____
Authorized Signator(s)

(Seal deemed
to be affixed)

Appendix 2B

SAMPLE RIGHT OF FIRST REFUSAL

To secure an interest in a property which the owner expects not to sell either in the immediate future or even in their lifetime, the land trust may pursue a registered Right of First Refusal. This securement tool is registered against the landowner's title, usually for a specified period of time, and a Right of First Refusal provides the land trust with the first option against the purchase of the property. It permits the land trust access before the property moves into the market. This is a case where an eventual sale is desirable to the vendor, but the timing is not known and the proposed sale will occur at an unknown time in the future.

1. If, during the period of _____ years from the date of this Agreement (Right of First Refusal):

(a) [owner's name] _____ receives an offer or offers to purchase all or part of the Property which he/she is prepared to accept; or

(b) [owner's name] _____ makes an offer to sell the property or any part thereof, or grants an option to purchase the Property to any party subject to the right of the [name of land trust] hereinafter set out and accepted by the offeree or grantee;

[owner's name] will forthwith advise the [name of land trust] in writing of all terms and conditions contained in such offer, offers, or options, and the [name of land trust], during a period of twenty (20) business days after the receipt of such written advice, shall have the right to be exercised by written notice to [owner's name] _____ to purchase the Property at the price and subject to the terms and conditions contained in the offer, offers, or options.

2. The agreement of purchase and sale constituted by the exercise of the Right of First Refusal herein contained shall be subject to compliance with Section 50 of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended from time to time.

3. The parties hereto may by mutual consent agree to extend from time to time the period of years referred to in paragraph 1.

4. Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be given either by delivering the same to the recipient or mailing the same to the recipient.

5. This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective executors, administrators, successors, and assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

Appendix 2C

SAMPLE INFORMAL OR HANDSHAKE AGREEMENT

The voluntary stewardship agreement below is based on Figure 12 of the Landowner Contact Training, 1991.

Natural Heritage Stewardship Award Agreement.

As the owner of land in the [name of natural area], I agree:

1. To maintain and protect the natural area to the best of my ability;
2. To notify the [name of land trust] of any planned land use change that might threaten the natural heritage features;
3. To notify the [name of land trust] of any other threats to the area, such as intensive logging or drainage; and
4. To notify the [name of land trust] of any intent to sell or transfer ownership of the property.

Signed this _____ day of _____, 199__.

Land Owner

[name of land trust]

[or simply shake hands and provide a copy of the terms of the agreement]

Witness

Owner

Witness

[NAME OF LAND TRUST]

Schedule A - Map of Property
Schedule B - Management Plan

Appendix 2E

THE NATURE CONSERVANCY OF CANADA SAMPLE LICENCE AGREEMENT

THIS LICENCE AGREEMENT made in duplicate as of the First day of
February, 1993

BETWEEN: THE NATURE CONSERVANCY OF CANADA
hereinafter called the “Licensor”

OF THE FIRST PART

- and -

hereinafter called the “Licensee”

OF THE SECOND PART

WHEREAS the Licensor is the registered owner of the lands described in
Schedule A hereto (the said “Lands”), whereon the Licensee has constructed a cabin
(the “Cabin”) for her personal use and occupation on the location shown on the sketch
attached hereto as Schedule B with the permission of the immediate predecessor in title
to the Licensor;

AND WHEREAS the Licensor is desirous of permitting the Licensee to
continue to locate on the said Lands, use and occupy the Cabin subject to the terms
and conditions herein set forth.

WITNESSETH that in consideration of the license fees, covenants and
agreements hereinafter reserved and contained on the part of the Licensee to be paid,
observed and performed, the Licensor hereby consents to the Cabin continuing to be
located on the said Lands, used and occupied by the Licensee subject to the following
terms and conditions:

1. The License shall be valid for and during the term of three years commencing the first day of February, 1994 and ending on the 31st day of January, 1997, with the Licensee having the option to apply to the Licensor to renew the Licence for a further term of three years which renewal the Licensor shall grant provided the Licensee has not been in breach of any of her covenants and any of the terms and conditions herein set out.
2. The Licensee shall pay to the Licensor as licence fees the sum of \$2.00 per annum, in advance, without any deduction, defalcation or abatement whatsoever, on the first day of February in each year, the first of such payment to be made on the date of the signing of this Indenture.
3. The Licensee covenants with the Licensor;
 - (a) to pay all realty taxes attributable to the Cabin within thirty days of receipt of invoice therefore from the Licensor; and the option of maintaining the existing access route from Lanark County Rd. 2 to the Cabin
 - (b) to maintain the Cabin in a reasonable state of repair;
 - (c) not to cut down timber or do any act which would damage or otherwise detract from the natural value of the said Lands; and
 - (d) not to carry on upon the Cabin any business that may be deemed a nuisance or by which the insurance on the premises will be increased.
4. The Licensee acknowledges that the Licence is personal to the Licensee and is not assignable and is subject to termination by either party giving to the other three months' notice thereof. Any license fee paid by the Licensee to the Licensor in advance shall be apportioned to the date of termination of the License and the balance shall be paid back to the Licensee.
5. The licensee agrees to take out and keep in force during the period of the License a comprehensive general liability insurance naming the Licensor as insured and containing a waiver of any subrogation right. Upon request from the Licensor or upon placement, renewal, amendment or extension of such insurance or any part thereof, the Licensee shall immediately deliver to the Licensor certificated of insurance signed by the insurer evidencing the required insurance. Such insurance shall be in form and content satisfactory to the Licensor acting reasonably.
6. The Licensee shall during the currency of the Licence act as a steward of the said Lands and shall report to the Licensor at least twice a year on the condition of the said Lands and, in particular, on any change in the natural value of the said Lands, and in consideration therefore, the Licensor shall pay to the Licensee the sum of \$80.00 on the 1st day of April in each year, the first of such payment to be made on the 1st day of April, 1994.

7. The Licensor acknowledges that the Cabin belongs to the Licensee and the Licensee acknowledges that:

(a) the Licensor has no responsibility whatsoever to the Licensee in respect of the Cabin or in respect of the Licensee's occupation thereof which shall be entirely at the risk of the Licensee; and

(b) the Licensor has no obligation to repair, replace, operate, maintain, insure or be responsible in any way for them, all of which shall be the Licensee's responsibility, and the Licensee hereby releases, acquits, discharges, indemnifies and saves the Licensor harmless of and from all actions, suits, claims and demands which may arise under the License and of and from any actions of the Licensee, her invitees, licensees and those for whom she is in law responsible in or about the said Lands.

8. Upon expiry or earlier termination of the License, the Cabin shall, at the option of the Licensee, be removed by her at her cost and expense from the said Lands within six months thereof, failing which the Cabin shall immediately become the absolute property of the Licensor.

9. The License shall terminate upon non-performance or non-observance of any of the covenants and agreements on the part of the Licensee to be performed and observed after she has been afforded reasonable opportunity to rectify same.

10. Any notice to be given hereunder shall be in writing and may be served either personally, by fax or registered mail. Any such notice:

(a) in the case of the Licensor shall be served at:
110 Eglinton Avenue West
4th Floor
Toronto, Ontario
M4R 2G5
Attention: Mr. John Grant
Fax No.: (416) 932-3208

(b) in the case of the Licensee shall be served at:

Any party may change the address set out above by appropriate written notice to the other party. In any case, any such written notice shall be deemed to have been served on the date of its delivery or, if mailed, three (3) business days after the mailing thereof.

IN WITNESS WHEREOF the parties hereto have executed this
Indenture.

THE NATURE CONSERVANCY OF CANADA

Per: _____

SIGNED, SEALED AND DELIVERED)
in the presence of:)

Witness)

_____) 1/s

Appendix 2F

SAMPLE LEASE AGREEMENT

A full model lease agreement follows and includes conditions applicable in many situations.

THIS INDENTURE made (in duplicate) as of the _____ day of _____, 200_____ .

IN PURSUANCE OF THE SHORT FORMS OF LEASES ACT

BETWEEN:

[NAME OF LAND TRUST]
(hereinafter called the Lessor of the FIRST PART)

-and-

[insert the name of the other party]
hereinafter called the Lessee the SECOND PART

WHEREAS by agreement of purchase and sale dated the _____ day of _____, 200_____ and accepted on the _____ day of _____, 200_____ (the "Agreement"), the Lessor agreed to purchase part of the lands owned by the Lessee situate in the Township of _____, in the County of _____ and being comprised of [insert legal description];

AND WHEREAS the Agreement provides that the Lessor shall lease to the Lessee part of the lands owned by the Lessor comprising [insert description of lands to be leased] (hereinafter referred to as the 'said Lands');

WITNESSETH that in consideration of the rents, covenants and agreements hereinafter respectively reserved and contained on the part of the Lessee to be respectively paid, observed and performed, the Lessor hath demised and leased and by these presents doth demise and lease unto the Lessee part of the said Lands containing by admeasurement _____ (____) acres, more or less, as more particularly outlined and illustrated in Schedule A annexed hereto (hereinafter referred to as the "demised premises");

TO HAVE AND TO HOLD the demised premises for and during the term of _____ (____) years to be computed from the _____ day of _____, 200_____, and thenceforth next ensuing, and fully to be complete and ended on the _____ day of _____, 200_____ .

YIELDING AND PAYING therefor yearly during the said term unto the Lessor the sum of _____ DOLLARS of lawful money of Canada per acre, without any deduction, defalcation or abatement whatsoever in advance, the first of such annual payments to become due and be made on the date of execution hereof.

THE Lessee COVENANTS with the Lessor to pay rent.

AND to use the demised premises for agricultural and wildlife management purposes only. *[Given that there is broad scope for interpretation here, add considerable details, if possible, and relate the approved uses to the existing uses where appropriate. A list of prohibited or restricted activities could be added here, similar to those in a conservation easement.]*

AND to pay business goods and services and other taxes payable by it.

AND to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

AND to keep up fences.

AND to perform all statute labour.

AND not to cut down timber or trees of any kind whatsoever, except fallen or live trees whose branches interfere with the agricultural use of the demised premises;

AND that the Lessor may enter and view state of repair.

AND that the Lessee will repair according to notice in writing, reasonable wear and tear, damage by fire, lightning and tempest only excepted.

AND will not assign or sub-let without consent; and such consent may, notwithstanding any section of the *Landlord and Tenant Act* of the Province of Ontario, be arbitrarily refused by the Lessor in its sole and uncontrolled discretion.

AND will not carry on any business that shall be deemed a nuisance on the demised premises.

AND that he will leave the demised premises in good repair (reasonable wear and tear and damage by fire, lightning and tempest only excepted).

AND *[include any other terms that may be necessary]*

PROVIDED that the Lessee may remove his fixtures, if such removal may be and is done without injury to the demised premises.

AND the Lessor shall be responsible for payment of the realty taxes and carrying its own insurance policy against third-party liability and the Lessee shall be responsible for carrying its own crop, third-party liability and other insurance, it being understood that the Lessor shall in no way be responsible for any loss or damage which the Lessee may suffer as a result of his activities or otherwise on the demised premises.

AND the Lessee doth hereby further covenant and agree with the Lessor in manner following, that is to say: THAT the Lessee will during the said terms, cultivate, till, manure and employ such parts of the demised premises as are now or shall hereafter be brought under cultivation in a good farmer-like and proper manner, impoverish, depreciate or injure the soil, and will plough the lands in each year during the said term, and at the end of the said term will leave the said land so manured as aforesaid. AND will during the continuance of said term mow the grass along the fences and in the fence corners on the demised premises, keep down all noxious weeds and grasses, which shall grow upon the demised premises or on the side of the roads or highways adjacent thereto, and will not sow or permit to be sown any grain infected by smut or

containing any foul seeds or noxious weeds, and will not suffer or permit any such foul seeds or noxious weeds to go to seed on the demised premises. AND will use only those chemicals on the demised premises which have been approved by the Ministry of Agriculture, Food and Rural Affairs. AND the Lessee will cooperate with the Lessor in complying with the requirements of the *Weed Control Act, R.S.O. 1990, c.W.5* and the *Drainage Act, R.S.O. 1990 c.D.17* in the event that any problem in respect of compliance with the provisions thereof should arise.

AND will keep the mouths of all underdrains on the demised premises open and free from obstruction, and in good running order at all times during the said term, and will not suffer or permit such drains, or the water-courses in any open ditches on the demised premises to become obstructed, but will constantly keep the same free and clear, for the escape of the water flowing therein.

PROVIDED that upon expiry of the term hereof, the Lessee shall give vacant possession of the demised premises to the Lessor, but shall have the first right until the day of , 200 , to lease the demised premises upon such terms and conditions as are satisfactory to both the parties in the event that the Lessee decides during such period to lease the demised premises.

PROVIDED also, and it is hereby expressly agreed and understood by the parties hereto, that if the term hereby granted or any of the goods or chattels of the Lessee shall be at any time during said term seized or taken in execution, or attachment by any creditor of the Lessee or if the Lessee shall make any Chattel Mortgage or Bill of Sale of any of its crops or other goods and chattels, or any assignment for the benefit of creditors, or becoming bankrupt and insolvent, shall take the benefit of any Act that may be in force for bankrupt and insolvent debtors, or shall attempt to abandon the demised premises, or to sell and dispose of its farm stock and implements, then, in every such case, the term hereby granted shall at the option of the Lessor immediately become forfeited, void and determined.

IN the event of any dispute arising out of this lease, the parties hereto agree that such dispute shall be referred to arbitration in accordance with the provisions contained in the *Arbitrations Act*, as amended from time to time.

ANY notice or other communication required or permitted to be given hereunder shall be in writing and shall be given either by delivering the same to the recipient or mailing the same postage prepaid in a government post box to the recipient at the following address:

If to the Lessor: *[insert contacts, addresses etc.]*

If to the Lessee: *[insert contacts, addresses etc.]*

ANY notice or other communication mailed, sent by facsimile (fax) or delivered as aforesaid it shall be deemed to have been given and received on the date it was personally delivered or the date sent by fax or if mailed on the third business day after mailing same. Either the Lessor or the Lessee may change its address for service from time to time by giving notice in accordance with the foregoing.

Appendix 2G

SAMPLE ANNOTATED CONSERVATION EASEMENT

Dated November 1, 1999

Prepared by Paul Peterson

Introduction

The Nature Conservancy of Canada and the Federation of Ontario Naturalists have sponsored the preparation of this *Sample Annotated Conservation Easement Agreement* as a resource for land conservation organizations, landowners and their professional advisers as they work toward developing the use of conservation easement agreements in Ontario.

This sample agreement is not simply to be copied. It is intended as an example only, to provide the reader with an introduction to the types of provisions that might typically be included in a conservation easement agreement. The actual terms and text of any individual conservation easement should be tailor made to the particular parties, the property and the circumstances and should be prepared in consultation with professional advice from lawyers, accountants, land surveyors or others as appropriate.

This sample agreement has been prepared specifically within the context of the Ontario *Conservation Land Act* which is referred to in this document simply as the “Act”.

Sample Conservation Easement Agreement

DATED this day of , .

B E T W E E N:

Insert name
(hereinafter called the “Owner”)

OF THE FIRST PART

- and -

Insert name
(hereinafter called the “Conservation Organization”)

OF THE SECOND PART

Commentary

Section 3 of the Act provides that (only) the owner of land may grant an easement or enter into a covenant with a conservation body. Owner is defined in the Act as the “person registered on title in the proper land registry office as the owner of the land”. In the agreement itself it would be acceptable to refer to the owner by name, or as the “Grantor” or as the “Owner” as was done in this sample agreement.

The “conservation organization” may be referred to instead as the “Land Trust”, the “Municipality”, the “Grantee” etc. to best suit the circumstances. Only a qualified “conservation body” will be capable of holding a conservation easement under the Act. Conservation bodies are defined in sub-section 3(1) of the Act to include various government organizations and non-government corporations which are “a charity registered under the Income Tax Act (Canada)”. An individual or an unincorporated organization will not qualify as a “conservation body”. See section 3 of the Act, attached as an Appendix.

In consideration of the sum of two (\$2.00) dollars now paid by the Conservation Organization to the Owner and in consideration of the covenants, terms, conditions and restrictions contained herein, and pursuant to the *Conservation Land Act*, R.S.O. 1990, c.C.28, as amended, the Owner and the Conservation Organization hereby agree as follows:

ARTICLE 1

DEFINITIONS

1.1 For the purposes of this Agreement, the following words and phrases shall have the following meanings:

1.2 “Act” means the *Conservation Land Act*, R.S.O. 1990 c.C.28 as amended and any statute that may be enacted to modify or replace the same.

This sample conservation easement is pursuant to the Ontario Conservation Land Act which authorizes a wide range of government and non-government organizations to hold such easement agreements. Note however, that conservation easements are also authorized by other legislation including the Ontario Heritage Act which may be applicable where, for example, the objective is preservation of historical or cultural resources .

1.3 “Agreement” or “this Agreement” means this Agreement and the schedules attached hereto as at the date hereof and as amended from time to time.

1.4 “Conservation Body” means a conservation body as defined in the Act.

See note under “Conservation Organization”, on page 1.

1.5 “Covenants” mean the covenants set out in Article 4 as the same may be waived, varied or released by the Conservation Organization in accordance with this Agreement.

The Covenants are the obligations and restrictions on the parties that are intended to run with the Lands and bind future owners. The other principal operative part of the conservation easement agreement is the right of access under the “Easement” heading of Article 5.

1.6 “Lands” means the lands and premises of the Owner situate in the Province of Ontario and more particularly described in Schedule “A” attached hereto and includes any buildings, structures and improvements now existing or constructed during the Term.

This will normally refer to all of the contiguous Lands owned by the Owner. Where only part of the Lands are to be affected by the conservation easement or where the Owner owns abutting lands, the conservation body should seek professional advice on compliance with the severance provisions of the Ontario Planning Act.

1.7 “Management Plan” means the Management Plan for the Lands attached hereto as Schedule “C” and including all of the restrictions, obligations and rights included therein.

If appropriate the parties may establish a plan for management of the property in advance dealing for example with habitat enhancement or with timber harvesting. However, the easement agreement may also be executed by the parties and registered on title without a detailed prescription for management.

1.8 “Owner” means the above named party of the First Part and any person who at any time after registration of this Agreement becomes the registered owner of the Lands or any part thereof or any ownership interest therein, including being a trustee for any beneficial owner of the Lands.

1.9 “Protected Area” means that part of the Lands including ***(insert feature name or description, such as the estuary and wetland)*** that are identified as Part ***(insert number)*** on Reference Plan ***(insert number)***.

This definition anticipates that some parts of the Lands may be subject to a greater level of protection and to greater restrictions on use. It will be essential to future enforceability that the “Protected Area” be very clearly defined or described. Where a clearly defined boundary is not easily identified, a reference plan prepared by an Ontario Land Surveyor may provide the necessary clarity and precision.

1.10 “Report” means the Baseline Documentation Report describing the Lands and documenting the natural values and features and current uses of the Lands, attached as, or referenced to in, Schedule “B” attached hereto.

A baseline report, intended to document the existing condition of the Lands and the heritage resource may be invaluable in future enforcement of the conservation easement. Restrictions, for example on tree cutting may be valid on their own, but may be much more effective and enforceable if the composition and condition of the forest is documented. While a separate baseline report will be helpful in many situations and is recommended, it is not essential and the agreement may be completed without such a report, if the parties are satisfied that the covenants, restrictions and condition of the property are defined clearly enough for enforcement purposes.

1.11 “Term” means the term of this Agreement being from and including the date of this Agreement to the nine hundred and ninety ninth anniversary of the date of this Agreement or the date on which all of the Covenants and the Easement cease to have effect in accordance with this Agreement, whichever date shall first occur.

If the easement is to be granted in perpetuity, then this definition will not be required and the grant of conservation covenants and easement (sections 4 and 5) may be drafted accordingly.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES

2.1 The Owner covenants and warrants that the Owner is the legal, beneficial and registered owner of the Lands with good title thereto subject only to the following encumbrances:

(Insert brief descriptions of each encumbrance, such as a mortgage with its date and instrument registration number)

Readers may be familiar with the traditional form of agreement in which background facts and the purpose of the agreement are set out in recitals or “whereas” clauses. Although that traditional form is acceptable, the recitals may not be considered an operational or enforceable part of the agreement. Critical facts, such as ownership of the property, should be incorporated into the operative part of the agreement whether or not the traditional form of recitals are used. So, for example if parties use the traditional recital format, the agreement text should provide that “The statements contained in the recitals are true and correct”.

In this sample agreement the traditional recitals have been replaced by operative sections setting out the “Representations and Warranties” and the “Intention” of the Parties.

Section 2.1 addresses the ownership of the Lands and is intended to identify the charges or encumbrances affecting the land title. It is critical that the Conservation Body obtain a title search and existing surveys as soon as possible in the process of preparing the easement agreement. There may be ownership and title issues to deal with before an easement can be finalized. For example if there are mortgages on title, the Conservation Body will want to have the interest of the mortgagee postponed to the conservation easement. Without that protective measure a pre-existing mortgagee could come into possession of the property on a mortgage default and might not be bound by the conservation easement.

2.2 The parties represent and warrant to each other that the Report accurately describes the Lands and the current use of and natural values and features of the Lands and is intended to serve as an objective information base for monitoring compliance with this Agreement.

See definition of “Report” above.

2.3 The Lands include significant natural features (***including ..insert name or description of feature***) which are further described in the Report and which the Owner and the Conservation Organization have agreed to protect and enhance.

ARTICLE 3

INTENTION

3.1 It is the intention of the parties that this Agreement will ensure the protection, maintenance, restoration and enhancement of the natural features on the Lands and will prevent any use of the Lands which will damage or destroy those natural features or prevent their restoration and enhancement.

This section setting out in broad terms the intention of the parties, will be a useful reference in interpreting the detailed covenants and rights under the agreement in the future, and may also provide guidance for those situations and disputes which were not or could not be anticipated when the agreement was prepared. Set out below is an alternate statement of intention for preservation of forest and agricultural land use.

Alternate 3.1 It is the intention of the parties that this Agreement will ensure that the Lands will be retained in open space, forest and agricultural use and that this Agreement will prevent any use of the Lands which will damage or destroy the existing open space, forest and agricultural character of the Lands.

ARTICLE 4

COVENANTS

4.1 In order to provide for the protection, maintenance, restoration and enhancement of the Lands and the natural features located on the Lands, the Owner covenants and agrees that it shall not commit or permit any act or activity, make any use of the Lands or undertake or allow to be undertaken any activity, use, development or construction on the Lands inconsistent with the Intention of the parties as set out in section 3.1 or inconsistent with the prohibitions set out in this section. Without limiting the generality of the foregoing, the Owner expressly covenants and agrees that, except with the prior written approval of the Conservation Organization, it shall not:

Other Easements

Grant any easement in, over, on, under or through the Lands;

Subdivision

Sever or subdivide the Lands;

The covenants are a key operational part of the agreement. Careful consideration and negotiation will be required to determine the exact nature of the restrictions and obligations to be imposed on any particular property. The covenants should be consistent with the nature and proposed management of the resource to be protected, and the intention of the parties as set out in article 3.

Examples of both restrictions (negative covenants) and obligations (positive covenants) are provided in this sample agreement. However, these must be viewed as examples only. Timber harvesting, agricultural activities, hunting and limited recreational or residential development are all examples of activities that may be prohibited completely, restricted or permitted depending upon the objectives of the parties and the requirements of sound resource management. The opportunity to tailor each set of restrictions and

obligations to the nature of the land resource may be viewed as one of the major advantages of the conservation easement as a tool for land protection.

Finally, resist the temptation to include all sorts of protective restrictions simply because there is the opportunity to do so. Focus on those covenants and land use restrictions that are most important to achieving the parties objectives and on those covenants and restrictions that the conservation body is actually able and willing to monitor and enforce.

Several approaches to the structure of this part of the agreement are possible. For example, an easement agreement could remove all of the potential development rights and uses from a property subject only to specific exceptions identifying those uses and activities which would still be permitted. While that might be a strong legal position, it might also make it more difficult to negotiate an agreement with a donor. This sample agreement reflects the more common in practice of listing or identifying the specific restrictions and obligations (in section 4.1). Other rights are reserved to the Owner (see section 8.1). In determining which approach may be appropriate and effective in different circumstances, consideration might be given to whether the easement is being donated or purchased and whether a very high level of protection is required.

Buildings and Structures

Construct, erect, maintain or allow the construction, erection or maintenance of any building or structure on the Lands;

Roads, Parking Areas, Foot Paths

Construct, improve or allow the construction or improvement of any road, parking lot, dock, aircraft landing strip or other such facility, except for the maintenance of existing foot trails, fire lanes or other accesses on the Lands;

Motorized Vehicles

Operate or allow the operation of dunebuggies, snowmobiles, all-terrain vehicles, automobiles, motorcycles, motorboats, personal watercraft or any other types of motorized vehicles on the Lands;

Mobile Homes

Use or allow the Lands to be used as a trailer or mobile home park, parking or storage area;

Dumping

Dump or allow the dumping of soil, rubbish, ashes, garbage, waste or other unsightly or offensive materials of any type or description on the Lands;

Pesticides

Use or allow the use of pesticides, insecticides, herbicides, chemicals or other toxic materials of any type or description on the Lands;

Grading, Topography

Change or allow any changes in the general appearance or topography of the Lands,

including and without limiting the generality of the foregoing, tilling of the soil, the construction of drainage ditches, retaining walls, dams, ponds, transmission towers and lines, and any similar undertakings, as well as the dumping, excavation, dredging or removal of loam, gravel, soil, rock, sand or other materials;

Vegetation

Remove, destroy or cut or allow the removal, destruction or cutting of trees, shrubs or other vegetation except as may be necessary for (i) the maintenance of existing foot trails, fire lanes or other accesses, (ii) the prevention or treatment of disease, or (iii) other good husbandry practices;

Planting

Plant or allow the planting or other introduction of non-native plant or animal species.

Hunting, Fishing, Trapping

Use or allow the Lands to be used for commercial or sport hunting, fishing or trapping;

Firearms

Use or discharge or allow the use or discharge of firearms on the Lands;

Livestock and Fences

The Owner further covenants and agrees that the Owner will not permit agricultural livestock to enter on or graze upon the Lands. The Owner will maintain the existing fencing along the boundaries of the Lands in a condition that will prevent livestock from entering into the Lands.

This is an example of a negative covenant combined with a positive obligation to maintain livestock fences. Positive obligations to maintain fences, culverts, trails etc. could be imposed upon either the Owner or the Conservation Organization according to the requirements of the particular circumstances.

ARTICLE 5

EASEMENT

5.1 The Owner hereby grants to the Conservation Organization a free, uninterrupted, unobstructed and non-exclusive right and easement in, over, upon and through the Lands to permit the Conservation Organization employees, agents, servants, workers, contractors, officers and directors, and their supplies, equipment, materials, machinery and vehicles to enter on and have access to the Lands at reasonable times and subject to the notice requirements specified below and for the following purposes:

- (1) inspection, in order to determine compliance with this Agreement and to determine those measures necessary to ensure compliance with the Management Plan;

Paragraph 3(2) (b) of the Act provides that an owner may grant an easement for access to the lands for the purposes of conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land. In this sample agreement, an access easement is provided to allow compliance inspections and to allow work by the conservation body on the land either to carry out any management and enhancement activities that may be identified in the agreement or to remedy a default by the owner.

Caution: In establishing and setting out the extent of the easement, it will be important to ensure that the subdivision control provisions of section 50 of the Ontario Planning Act are also complied with. With some exceptions, that section of the Planning Act prohibits any agreement granting the use of or right in land unless it is affecting the entire parcel of land.

- (2) to carry out any construction, demolition, maintenance, alteration, repair, improvements, installation, work or restoration of the natural features reasonably required in the opinion of the Conservation Organization pursuant to the Management Plan or pursuant to Article 6 of this Agreement; and

These “self-help” provisions of the Agreement may be necessary where the conservation body has significant management responsibilities or where major restoration or enhancement of natural features is proposed. However, where the conservation easement is merely to protect open space and natural evolution of the landscape such additional access rights may not be necessary or desirable.

- (3) for all purposes reasonably necessary or incidental to the exercise of the rights hereby created or related to any of the foregoing purposes.

5.2 Prior to entry or access to the lands for the purposes identified in section 5.1, the Conservation Organization shall provide written notice to the Owner as follows, unless in the opinion of the Conservation Organization, there is an emergency or other circumstance which does not make it feasible to give notice of the intent of the Conservation Organization to enter on the Lands:

- (1) for the purposes specified in paragraphs 5.1 (a) at least twenty-four (24) hours written notice; and

Although not required by the Act, these provisions requiring that notice be provided by the Conservation Organization prior to access on the Lands are suggested as a courtesy to the existing and future land owners. Notice is shorter where the purpose of access is for compliance inspection and longer where more intrusive and expensive works are proposed.

- (2) for the purposes specified in paragraph 5.1 (b) and (c) at least 10 days written notice. The notice under this paragraph (b) shall describe the nature, scope, design, location, timetable and any other material aspect of the activity proposed.

5.3 The rights described in Sections 5.1 and 5.2 are collectively referred to as the “Easement”.

5.4 No right of access by the general public to any portion of the Lands is conveyed by this Agreement.

In many cases public access to the natural features located on the Lands may not be necessary or desirable. In addition, land owners may be more willing to grant a conservation easement knowing that rights of public access are not attached. In cases where the parties agree that rights of public access are to be included, the conservation body should seek professional advice on the mechanisms for ensuring the enforceability of such rights.

ARTICLE 6

OWNER’S OBLIGATIONS AND INDEMNITY

6.1 The Owner shall, at the expense of the Owner, continue to care for and operate the Lands as would a careful and prudent owner. In particular, and without limiting the generality of the foregoing, the Owner shall:

- (1) maintain the Lands and keep and repair the improvements thereon and keep the Lands free of construction liens;
- (2) carry and maintain adequate comprehensive general liability coverage with the Conservation Organization being a name insured thereunder and provide the Conservation Organization with evidence of such coverage on a continuing basis;
- (3) pay as they become due municipal and provincial taxes, rates and fees including any that may be charged or levied against the Conservation Organization by reason of this Agreement and the rights transferred hereunder and all charges for utilities, public or otherwise, and provide the Conservation Organization with evidence of such payments on its reasonable request.

6.2 The Owner shall and does hereby indemnify and save harmless the Conservation Organization, its directors, officers, employees, agents and contractors from and against any and all actions, causes of action, suits, claims, demands by or on behalf of any person arising out of or occasion by any act or omission, negligence or otherwise, in the use and maintenance of the Lands by the Owner, any licensee or

lessee thereof or anyone for whom the owner is in law responsible, including, if the Lands or any part thereof is certified to be ecologically sensitive land under the *Income Tax Act* (Canada) and the use of the property so certified is changed without the permission required under such statute, any penalty in tax imposed thereunder.

ARTICLE 7

DEFAULT

7.1 Breach or Default In the event of breach of or default in the obligations and covenants of the Owner under this Agreement, the Conservation Organization may take any action available to it at law, in equity, by statute or under this Agreement provided that the Conservation Organization shall first give to the Owner written notice of the default which notice shall specify the nature of the non-compliance and the measures necessary to secure compliance with the terms of this Agreement. If notice of default is given, the Owner shall have sixty days following receipt of the notice of default to complete the required measures and to rectify the non-compliance or default.

7.2 If the Conservation Organization in its sole discretion determines that circumstances require immediate action to prevent or mitigate damage to the conservation features of the Lands, the Conservation Organization may pursue its remedies under this Article 7 without prior notice to the Owners or without waiting the expiry of the sixty day notice period as otherwise required under paragraph 7.1.

7.3 In the event that the Owner has failed to provide compliance within the sixty day period allowed, then the Conservation Organization shall be entitled to enter on to the Lands and to complete those works and measures necessary to provide compliance and to remedy the default at the expense of the Owner. Until paid to the Conservation Organization by the Owner, such costs of remedy incurred by the Conservation Organization shall be a debt owed by the Owner to the Conservation Organization and shall be a charge upon the Lands enforceable in the same manner as a mortgage registered against the whole of the Lands and recoverable by the Conservation Organization in a court of law.

7.4 The parties recognize that damages based upon market value may not be adequate or effective to compensate for destruction of or restoration of the conservation features of the Lands as they existed prior to default or breach of the Agreement. Accordingly, the parties agree that:

- (1) compensation to the Conservation Organization in the event of default or breach of the Agreement may be based upon market value, restoration or replacement costs whichever, in the opinion of the court shall better compensate the Conservation Organization,
- (2) In addition and without limiting the scope of the other enforcement rights

available to the Conservation Organization under this Agreement, the Conservation Organization may bring an action or an application for injunctive relief to prohibit or prevent default or the continuance of default under this Agreement.

Traditionally, a court would look to the market value of a property before and after breach of an agreement to determine the appropriate amount of compensation. However, when considering the ecological integrity of natural features such as wetlands, it is possible that destruction and drainage of the wetland could actually enhance the development potential and market value of the Lands. In these circumstances the Agreement is specifically drafted to provide compensation which would allow restoration or replacement of the damaged natural feature.

In addition, it should be recognized that since restoration or replacement of a mature natural feature or ecosystem may not be possible, the agreement should specifically provide for injunctive relief to prevent damage to the natural features in the first place.

ARTICLE 8

NOTICE

8.1 Any notice (which term in this paragraph includes any request or waiver) provided or given hereunder shall be sufficiently given by either party if in writing and delivered by hand, sent by facsimile or other means of electronic communication or mailed by prepaid registered post if to the Conservation Organization as follows:

Address: •

Fax Number: •

and to the Owner as follows:

Address: •

Fax Number •

Any notice so delivered or any notice so forwarded by facsimile or other means of communication shall be deemed to have been given on the next business day following the day of delivery or forwarding and any notice so mailed shall be deemed to have been given on the fourth business day following the day of mailing. Either party may in any manner aforesaid give notice to the other party of any change in the address or fax number thereof and thereafter the new address or fax number shall be the address of such party for the purpose of giving notice hereunder.

ARTICLE 9

GENERAL PROVISIONS

9.1 The Owner reserves to itself, and to its successors and assigns, and any transferee therefrom, all rights accruing from its ownership of the Lands, including the right to engage in, or permit or invite others to engage in, all uses of the Lands that are not expressly prohibited herein and are not inconsistent with the purpose and terms of this Agreement.

It would be normal to interpret the Agreement as conveying only those rights and restrictions specifically described in the terms of the Agreement and to assume that all rights not conveyed are reserved by the Owner. This provision is included to provide the Owner/Grantor with the comfort of having that assumption made explicit.

9.2 Neither the Owner or the Conservation Organization shall be in breach of this Agreement or liable to the other for any damage to or change in the Lands, resulting from causes beyond the control of such party, including, without limitation, accidental fire, flood, storm, earth movement, insect damage, disease or trespass.

This provision would relieve the land owner or conservation organization for responsibility or liability for “acts of God” lying outside of the control of the parties.

9.3 No person who is an Owner shall be liable to the Conservation Organization for any breach of or default in the obligations owed to the Conservation Organization under this Agreement committed after:

- (1) the registration of a transfer by such person of all of the interest thereof in the Lands; and
- (2) delivery to the Conservation Organization of the acknowledgement and assumption required under section 9.4.

This provision provides an incentive for the owner to ensure that any purchaser of the lands will provide explicit written acknowledgement and acceptance of the obligations under the agreement.

9.4 Notice of Transfer and Acknowledgement of Priority. The Owner shall not transfer or permit any mortgagee to transfer any ownership interest in the Lands without requiring the transferee to provide a written acknowledgement and assumption to the Conservation Organization acknowledging the priority of this Agreement and the interest of the Conservation Organization and assuming the obligations of an Owner under this Agreement and the Owner will not lease or license the Lands or any part thereof without such lease or license being made expressly subject to this Agreement.

9.5 Assignment. The Conservation Organization may assign all of its interest in this Agreement to any qualified Conservation Body including the local municipality or the conservation authority provided that the Conservation Organization shall provide the Owner(s) with written notice of such assignment. The Conservation Organization shall not be liable to the Owner for any breach or default in the obligations owed to the Owner under this Agreement committed after notice of the assignment of this Agreement has been given to the Owner.

Assignment of the agreement to another conservation body is specifically contemplated by sub-section 3.(3) of the Act.

This provision in the agreement is directed to relieving the original conservation body from any obligations or liability to owner after the assignment and notice of assignment.

Note that the Act also provides for mandatory assignment of the agreement to the Minister of Natural Resources in the event that the original “conservation body ceases to be a conservation body”. That might occur if a non-profit corporation lost its charitable status under the Income Tax Act (Canada) and could no longer satisfy the definition of a “conservation body” in the Act.

9.6 Registration. The Conservation Organization shall register this Agreement against title to the Lands and the Owner shall execute any document that may be required to allow such registration.

Registration on title will be essential to provide notice of the conservation easement to any subsequent purchaser, mortgagee or any other person taking an interest in the land.

Read in combination with section 9.10 the costs of registration would fall upon the conservation body. Of course the agreement can be amended to specify that this will be to the account of the Owner. Alternately, the conservation organization might negotiate to accept a donation from the Owner to cover the cost of agreement preparation and registration.

9.7 Failure to Exercise or Enforce Rights. No failure by the Conservation Organization to require performance by the Owner of any provision of this Agreement shall affect the right of the Conservation Organization thereafter to enforce such obligation and no failure by the Owner to perform any of its rights or obligations hereunder shall be taken as a waiver of such performance or the performance of any other obligation in the future.

9.8 Time of the Essence. Time shall be of the essence of this Agreement and shall be deemed to remain so notwithstanding any extension of any time limit.

9.9 Severability. All provisions of this Agreement including each of the Covenants shall be severable and should any be declared invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby.

9.10 Costs. Save as provided herein or ordered by any court or tribunal, each party shall be responsible for its own legal fees and related expenses arising from the negotiation and implementation of this Agreement.

9.11 Joint and Several. Whenever the Owner should be comprised of more than one person, the obligations thereof hereunder shall be joint and several.

9.12 Enurement. This Agreement, including the Covenants and the Easement shall run with the Lands and enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns for the Term.

IN WITNESS WHEREOF the Owner and the Conservation Organization have executed this Agreement as at the date first above written.

SIGNED, SEALED AND DELIVERED in the presence of:

Witness Per: _____
Name: Owner

Witness Per: _____
Name: Owner

Conservation Organization

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have the authority to bind the
Corporation.

APPENDIX TO SAMPLE CONSERVATION EASEMENT AGREEMENT

ONTARIO CONSERVATION LAND ACT

(R.S.O. 1990 Chapter c.28, as amended
by S.O. 1994, c.27, s.128(1) and (2))

3. (1) In this section,

“conservation body” means,

- (a) the Crown in right of Canada or in right of Ontario,
- (b) an agency, board or commission of the Crown in right of Canada or in right of Ontario that has the power to hold an interest in land,
- (c) a band as defined in the *Indian Act* (Canada),
- (d) the council of a municipality,
- (e) a conservation authority,
- (f) a corporation incorporated under Part III of the *Corporations Act* or Part II of the *Canada Corporations Act* that is a charity registered under the *Income Tax Act* (Canada),
- (g) a trustee of a charitable foundation that is a charity registered under the *Income Tax Act* (Canada); (“organisme de protection de la nature”)

“owner” means the person registered on title in the proper land registry office as the owner of land. (“propriétaire”)

(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.

(3) The easement or covenant may be assigned by a conservation body to another conservation body.

(4) The easement or covenant is valid whether or not the conservation body or assignee owns appurtenant land or land capable of being accommodated or benefited by the easement or covenant and regardless of whether or easement or covenant is positive or negative in nature.

(5) The easement or covenant may be registered against the land affected in the proper land registry office and, once registered, it runs with the land against which it is registered.

(6) The conservation body or assignee may enforce the easement or covenant against the owner of the land and, if it is registered, against any subsequent owner of the land against which it is registered.

(7) If a conservation body ceases to be a conservation body, it shall be deemed to have assigned every easement and covenant to which it is a party to the Minister.

(8) The Minister may register notice of the deemed assignment against the land affected in the proper land registry office and may assign the easements and covenants, or any of them, or hold them as if he or she were a conservation body.

(9) Nothing in this section limits a right or remedy that a person may have under any other Act, at common law or in equity in respect of an easement or covenant, if the right or remedy is not inconsistent with this section.

(10) A covenant under this section, whether positive or negative in nature, shall be deemed to be a restrictive covenant.

(11) The Lieutenant Governor in Council may make regulations respecting records, information, reports and returns that a conservation body must keep, must open for inspection or must submit to the Minister or other person designated in the regulations.

Appendix 2H

SAMPLE LETTERS OF INTENT TO DONATE

Letters of Intent to Donate

The land trust may receive inquiries from owners of natural lands interested in donating the land, or an easement over the land, to the land trust. While these owners are making a tremendously generous offer, the land trust should assess whether the property meets its criteria, what the long-term stewardship/monitoring issues, etc., may be, and what financial resources are available/need to be raised to accept the donation. As in an Agreement of Purchase and Sale, some form of formal “offer” should be made by the donor and responded to by the land trust. Sample forms for Letters of Intent to Donate for a fee simple interest, a conservation easement, and for trade lands are included below.

Sample Letter of Intent to Donate - Fee Simple Interest

President,
[Name of Land Trust]
[Address]

Dear [Name]:

I (We), as the beneficial and registered owner(s) of certain lands in [location], described in the attached copy of the deed of land, intend to unconditionally donate my (our) property to the [name of land trust]. I (We) confirm that my (our) decision to donate has been freely and voluntarily made by me (us).

I (We) understand that my (our) intent to donate my (our) lands is subject to acceptance by the Land Trust and, if accepted, the Land Trust will endeavour to conserve the natural features and processes of the property and manage and protect the property according to the mandate and policies of the Land Trust. I (We) understand that the Land Trust reserves the right to transfer title of the property to a conservation organization with similar objectives and mandate as the Land Trust, but in doing so it will keep in mind the proper and continuing conservation of the property.

I (We) look forward to your response.

Donor(s) _____ Date _____

Sample Letter of Intent to Donate - Conservation Easement

President,
[Name of Land Trust]
[Address]

Dear [Name]:

I (We), as the beneficial and registered owner(s) of certain lands on [location], described in the attached copy of deed of land, intend to unconditionally donate a conservation easement agreement covering the natural portion of my (our) property to the [name of land trust]. I (We) confirm that my (our) decision to donate has been freely and voluntarily made by me (us).

I (We) understand that my (our) intent to donate a conservation easement to our lands is subject to acceptance by the Land Trust, and if accepted the Land Trust will endeavour to conserve the natural features and processes of the property and protect the property according to the terms of the conservation easement agreement. I (We) understand that the Land Trust reserves the right to assign the conservation easement to a conservation organization eligible under the *Conservation Land Act* to hold a conservation easement but in doing so it will keep in mind the proper and continuing conservation of the property.

I (We) look forward to your response.

Donor(s) _____ Date: _____

Sample Letter of Intent to Donate - Trade Land

President,
[Name of Land Trust]
[Address]

Dear [insert name]:

I, as the beneficial and registered owner of _____, containing _____ acres, more or less, intend to unconditionally donate my property to the [name of land trust]. I confirm that my decision to donate has been freely and voluntarily made by me.

I understand that my intent to donate my lands is subject to acceptance by the [name of land trust], and if accepted the [name of land trust] will use this Property as a "Trade Land," with revenues generated from the sale of the land used by the [name of land trust] to undertake conservation work elsewhere in Canada.

I look forward to your response.

Donor(s) _____ Date: _____

Appendix 21

SAMPLE BEQUEST WORDING

Generally, a land trust will prefer to accept donations of land during the donor's lifetime. This allows the land trust to confirm that the land meets its conservation objectives and that the terms of the donation can be fulfilled. It also avoids potential disputes with heirs or executors. The donation of land by bequest may provide a tax benefit to the donor's estate and can be claimed against 100% of the donor's income in the year of death and in the year prior to death.

The following is suggested wording for the last will and testament of anyone wishing to donate natural lands to a land trust. The wording reflects the fact that, although the donation of lands is always welcomed and it is always the hope that the lands can be permanently preserved, circumstances such as the impact of incompatible uses on adjoining properties or contamination can make this impractical or impossible. Thus, the land trust will always want the right to make the final decision on whether to accept or reject the donation of lands. Reluctantly rejecting lands because the testator imposes conditions that cannot be accepted should be avoided. Land trusts can only survive through the generosity of its supporters. Lands require management and protection, the payment of taxes and so on, so any cash donation with the gift of lands is always much appreciated.

I hereby gift and donate to the [*name of land trust*] (the "Land Trust") my lands described as _____ (the "Lands"). The Lands are special to me and my family and it is my wish (but not a condition of this donation) that the Lands be kept and maintained in a natural state and that the flora and fauna thereon be preserved insofar as may be reasonably possible and decided by the Land Trust. I request the Land Trust to make my wishes known to any person chosen by the Land Trust to own or manage the Lands. I would like the Lands to be known as [*woods, preserve, wetlands, etc.*] and that a suitable sign be erected acknowledging the donation. It is a condition of this gift that the Land Trust acknowledge in writing to my estate my wishes and request above.

In order to assist that Land Trust in keeping and maintaining the Lands as well as carrying on its other work I hereby donate to the Land Trust the amount of Dollars (\$ _____).

Appendix 2J

SAMPLE LIFE INTEREST (ESTATE) AGREEMENT

THIS INDENTURE made as of the _____ day of _____, 200 .

B E T W E E N:

THE [NAME OF LAND TRUST]
(hereinafter called the LICENSOR of the FIRST PART)

-and-

[insert name of the other party]
(hereinafter called the LICENSEE of the SECOND PART)

WHEREAS by an offer of donation dated the _____ day of _____, 200 , the Licensee offered to donate to the Licensor (which offer the Licensor accepted) the lands owned by the Licensee in the Township of _____ in the County of _____ and being comprised of [insert legal description] (hereinafter called "the said lands").

AND WHEREAS said offer of donation provided that the Licensor shall permit the Licensee to continue to occupy the [e.g.. house] and [e.g. garage, shed, barn, etc.] on the said lands as more particularly hereinafter described subject to the terms, covenants and conditions herein contained.

WITNESSETH that in consideration of the premises and covenants and agreements herein reserved and contained on the part of the Licensee to be observed and performed, the Licensor hath licensed and by these presents DOETH consent to the use by the Licensee of ALL THAT parcel or tract of land and premises situate, lying and being in the Township of _____ in the County of _____ containing _____ acres more or less, and being composed of [insert legal description].

TO HAVE AND TO HOLD the said premises free of any occupation charge in the nature of rent from the date hereof to the date on which the first of the following events occur:

- (a) the death of the Licensee;
- (b) the day which is 21 years less one day from the date of sale of the said lands by the Licensee to the Licensor hereof;
- (c) the Licensee ceases to use the said premises as his principal residence or as a cottage or recreational property; and
- (d) the substantial damage or destruction of the said premises and the Licensor in its absolute discretion decides that the same shall not be repaired or rebuilt. Provided that the Licensee may repair or rebuild the said Premises at his own cost and expense and thereafter continue to occupy same.

THE Licensee covenants with the Licensor to repair and maintain the said premises at his sole cost and expense and as deemed appropriate by him.

AND to keep up fences now existing around the house within the said premises.

AND not to cut down live trees of any kind whatsoever without the permission of the Licensor but may use dead falls for heating purposes.

AND to pay for all heat, water, light, and other utilities and amenities used in the said premises.

AND to pay all realty taxes attributable to the said premises.

AND that the Licensor may enter and view state of repair.

AND will insure and keep insured the said premises against fire, lightning, or tempest in an appropriate amount in the joint names of the Licensor and Licensee with loss, if any, payable as their respective interests may appear.

AND will not carry on any business on said premises.

AND *[add any terms that may be relevant or delete any that are not relevant]*

PROVIDED that the Licensee may remove his fixtures and chattels if such removal may be done and is done without injury to the said premises.

AND the Licensee doth hereby further covenant and agree with the Licensor in manner following, that is to say: THAT the Licensee will, during the term of the Licence, maintain the land surrounding the buildings in keeping with a country dwelling in a natural surrounding and not allow any waste or refuse to be deposited thereon.

AND will carefully protect and preserve all trees on said premises from waste, injury, or destruction.

ANY notice or other communication required or permitted to be given hereunder shall be in writing and shall be given either by delivering the same to the recipient or mailing the same postage prepaid in a government post box to the recipient at the following address:

If to the Licensor: *[insert contacts, address]*

If to the Licensee: *[insert contacts, address]*

ANY notice or other communication mailed or delivered as aforesaid shall be deemed to have been given at the date it was personally delivered or if mailed shall be deemed to have been given on the fifth (5th) business day following the date on which it was mailed. Either the Licensor or the Licensee may change his address for service from time to time by giving notice in accordance with the foregoing.

PROVISO for revocation of License by the Licensor on nonperformance of terms, covenants, and conditions.

It is hereby declared and agreed that this Licence is personal to the Licensee, is not assignable and is revocable upon the death of the Licensee, or upon his failure to perform any of the terms, covenants and conditions herein contained.

AND it is further agreed that whenever the singular and masculine are used in this Indenture they shall be construed as if the plural or the neuter or feminine had been used, where the context or the party or parties hereto so require, and the rest of the sentence shall be construed as if the grammatical and terminological changes thereby rendered necessary had been made.

This indenture shall bind the parties hereto, their successors, executors, administrators, and assigns.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seal.

SIGNED, SEALED AND DELIVERED)	THE [<i>NAME OF LAND TRUST</i>]
in the presence of)	
)	Per:
)	Name:
)	Title:
)	
)	[<i>LANDOWNER'S NAME</i>]
)	
)	
)	

Part 3

Securement Process

By Paul Peterson

September 2003

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

Appendix 3A

THE NATURE CONSERVANCY OF CANADA ENVIRONMENTAL ASSESSMENT FORM (PHASE I)

SITE: _____

LOCATION: _____

PREPARED BY: _____ DATE: _____

POLICY: Conservancy policy requires an environmental assessment, or audit, on every tract of land the Conservancy is proposing to acquire. In some situations, an assessment may also be required before the Conservancy transfers land it owns. The scope of each assessment may vary depending on the circumstances but, at a minimum, an assessment must include a physical inspection of the property and an appropriate inquiry into the historic uses of the property. Surrounding areas which could have an impact on the property in which the Conservancy is interested should be considered in the assessment as well.

The assessment should be conducted by a Conservancy staff member whenever possible or, if necessary and if in accordance with Conservancy policy, by another knowledgeable individual under Conservancy supervision. The assessment should be reviewed by the Conservancy staff responsible for the project.

ASSESSMENT FORM: This environmental assessment form must be completed to document your evaluation of the property. Please complete the form as fully as possible using “don’t know” or “not applicable” as appropriate for questions you cannot answer. Identify the source of specific information throughout the form whenever appropriate. Add additional pages/information where necessary. This form must be signed by the preparer and the reviewer. The original of this form (with attachments) should be retained for safe-keeping.

IMPORTANT REMINDER: Never place yourself in any situation which you believe may be dangerous to your health and safety.

OVERALL ASSESSMENT:

1. Listed below are some sources of information which you might consult in conducting this assessment. Please check those you actually relied on:

- Interviews with owner
 Interviews with others - identify:
 Interviews with fire, health, building, land use or environmental officials - identify:

Aerial photos - current

Aerial photos - historical (gives years of photos)

Topographical maps

Neighbourhood zoning maps/land use maps

Chain of title history

Title report

Building specifications/plans

Other government records - identify: _____

Previous environmental assessments - identify: _____

Other - specify: _____

2. Describe your visit(s) and how you inspected the property (e.g. walked perimeter, entered buildings, drove all passable roads, flew over interior).

Number of visits _____. Date/Time Inspected _____

Identify all persons present during visits (including owner, NCC staff, others):

3. Attach a sketch of the property covered by this assessment (and adjacent property, if appropriate). Use the sheet included at the end of this form if that is helpful or any other useful map. Show any bodies of water, swamps, wetlands, wells, improvements, structures, man-made features and any areas of concern noted in this assessment. Identify those areas that you physically inspected (e.g. paths walked, roads driven, etc.).

Take pictures of the property (particularly any problem areas) and include them with this form.

PROPERTY HISTORY/USE:

1. List all known historical and current uses of the property (e.g. agricultural, manufacturing, undeveloped land, etc.). Identify all known owners/operators. Include dates/time periods as appropriate.
2. List all known historical and current uses of adjacent properties which might have an impact on this property. Again, include dates/time periods as appropriate.
3. List all buildings/structures on the property and their uses.

GENERAL PROPERTY CONDITION:

Yes No Don't Know

When visiting the property, did you observe any:

Distressed vegetation or any areas that are bare for no apparent reason?

Unusual odours?

Stains (unusual or around areas where chemicals are stored/used?)

Evidence of dumping?

Trash or other debris?

Drains?

Any unusual depressions or mounds?

Are there any sheens or unusual colours on the surface of any water bodies?

Piping/vents for underground storage tanks?

Other areas of concern?

Comment on any “yes” answers above and locate those areas on the property sketch.

Are there any pits, ponds, lagoons, clarifiers, oil/water separators, surface impoundments, or sumps on the property?

If so, describe how they are used and what they contain.

DRUMS:

Are there any storage drums on the property?
If yes, locate them on the sketch and indicate:

- a. Are they empty?
- b. What is/was in the drums?
- c. Any evidence of leaking?
- d. Will the drums need to be removed?
- e. Describe the area around the drums.

TRANSFORMERS:

Are there transformers (pol-mounted or pad-mounted)
located on the property?
If so, indicate:

- a. The types of devices and who owns them.
- b. Are they labelled as containing PCBs or being PCB free?
- c. Is there any evidence of leaking or damage?

TRANS/WELLS:

Are there (or were there) any above or below ground storage tanks
on the property?
If yes, locate each tank on the sketch and indicate:

- a. Is the tank above ground or underground?
Its age _____ size _____
- b. Is the tank still there? If not, obtain details on removal.
- c. Have any permits been obtained for the tank?
If yes, review permits.
- d. Has the tank and associated piping even been tested?
If yes, attach results.
- e. Describe the area around the tanks. Identify any evidence of leaking or spilling.

Does the property contain any septic tanks or fields?
If yes, locate on the sketch and indicate:

- a. Are they in use or abandoned? ?
If yes, discuss.
- b. Did they receive any industrial materials?
If yes, discuss.

Are there any wells on the property?

If so, locate on sketch and indicate:

- a. What type of well is it? How is it used?
- b. Are the wells in use or abandoned?
- c. Are the wells locked or protected?
- d. Has the well water ever been tested?
If yes, attach results.
- e. Have there been any complaints about the quality of the water or flow rate?
If yes, discuss.

MINERAL/PETROLEUM OPERATIONS:

Have there ever been any oil or gas wells or other mining activities on the property?

If yes, locate these operations on the sketch and indicate:

- a. The type of operations on the property.
- b. Where were the wastes from such operations disposed of?
- c. Are there any oil or gas pipelines?

Has the pipeline leaked?
If yes, give details.
- d. Identify the owner/operator of any well, mine or pipeline.

RADON:

Has a radon test been performed in any building at the property?

If yes, attach results.

ASBESTOS:

Is there any evidence of materials that are likely to contain asbestos?

(Check roof, exterior, pipe coverings, spray-on fire proofing, cement sheet).

If so, describe the types, amounts and condition of materials (intact or deteriorating).

FILL/GRADING:

Has fill ever been brought on the property?
If so, indicate where it was placed and when and where it came from.

Has there been any grading or disturbance to the soil?
If so, indicate why.

CHEMICALS/WASTE DISPOSAL/SPILLS:

Have any chemicals been used on the property? (Consider “chemicals” to mean industrial materials and such products as cleaning compounds, lubricating agents, greases, oils, heating fluids, gasoline, pesticides, herbicides, fertilizers, metals).
If so, indicate the types of chemicals, how they were used, and where and how they were stored.

Has the property ever contained any areas used to dispose of waste?
If so, check below the kinds of materials disposed and identify the method of disposal (e.g. burning, discharge to water body, dump, land farming, landfill, recycled, settling ponds, surface impoundment, etc.)

Method of Disposal

- Appliances
- Asbestos
- Automobiles
- Chemicals
- Construction debris
- Garbage (food wastes)
- Household trash
- Incinerator ash
- Industrial wastes (identify type)
- Mining wastes
- Pesticide or herbicide containers
- Pesticides or herbicides
- Petroleum products
- Sewage sludge
- Tires
- Other (identify: _____)

Locate these activities on the property sketch. How long were these activities conducted?

Has there ever been a chemical spill or leak on this property?
If yes, indicate what was spilled, where it was spilled, how much was spilled and what actions were taken in response.

Have there been any chemical spills or leaks on adjacent property or in the surrounding area?
If yes, discuss.

STUDIES/RECORDS/ENFORCEMENT:

Have any previous environmental assessments/tests/samplings/impact statements been conducted for the property?
If so, attach copies.

Has the current owner had any communications with any government agency concerning environmental conditions on the property?
If yes, explain.

Have any government officials ever investigated, cited, or been involved with any violations of any environmental law at this property or on property in the immediate vicinity?
If yes, explain.

Does this property or any property within one-half mile appear on any list of “problem” sites that is maintained by any environmental agency?
If yes, explain.

SUMMARY:

Summarize the overall condition of the property and your conclusions/recommendations regarding the property.

Signature of Preparer

Date

Signature of Reviewer

Date

Signature of Reviewer

Date

Appendix 3B

THE NATURE CONSERVANCY OF CANADA GUIDELINES FOR THE REVIEW AND ACCEPTANCE OF PROPERTY DONATIONS

GUIDELINES FOR REVIEW AND ACCEPTANCE OF PROPERTY DONATIONS⁵

GUIDELINES: (Note: at least one of the following must be met)

1. Meets NCC Site Selection (ecological) Criteria.
2. Securement of property will ensure protection of adjacent, more ecologically significant area.
3. Donor of property is willing to establish endowment fund, provide irrevocable Planned Gift, property generates annual revenues, or project is funded under existing program.
4. NCC is facilitating the transfer of natural area to another agency, subject to standard land transfer agreements (to be completed within one year)
5. Property qualifies as “Trade Land”⁶
6. Corporate benefits (e.g. increased public recognition)

REVIEW AND APPROVAL PROCESS

1. Staff review background information on file in house, or with other conservation agencies, regarding documented significance of property or the larger natural area.
2. Staff arrange for a site visit to be conducted by member of SAN or equivalent, to undertake preliminary property evaluation, including consideration of potential toxic contamination – Ecological Assessment completed and reviewed. Staff seek recommendation from member of Scientific Advisory Committee or Conversation Data Centre
3. Staff request Letter of Intent to Donate, copy of Deed of Land and tax assessment from potential donor.
4. Staff authorize preliminary title search provided that the property:

⁵ “Property Donations” include fee simple donations of land and donations of conservation easements, covenants and servitudes.

⁶ “Trade Land” refers to fee simple donations where the donor has agreed to permit the NCC to use the property as an asset with the sale of the property generating revenue for NCC general use. Trade Lands must not be certified “ecologically sensitive” under the *Income Tax Act (Canada)*

- Meets either consideration (1), (2), or (3) of the guidelines, and approval of the Scientific Advisory Committee or CDC; or
 - Meets consideration (4) or (5)
5. Staff draft necessary documents (conservation agreement, life interest agreement, etc.) and authorize appraisal by certified local appraiser, utilizing standard Request for Appraisal Services form
 6. If necessary/requested, staff proceed with certification of property “ecologically sensitive” through certifying agency (note all donations of conservation easements or covenants where a charitable tax receipt is to be issued require certification)
 7. Staff arrange for transfer of property, execution of agreements and/or future disposition (if applicable) and management
 8. Staff provide periodic updates, and notify Executive Committee upon completion of transaction

For properties which do not meet NCC site selection criteria, but may have benefits from a corporate perspective, or for those donations for which there is to be no accompanying endowment fund, Planned Gift, generation of annual revenues, or existing program funding, staff seek a recommendation from the Executive Committee on whether or not to accept a property.

Appendix 3C

SITE ASSESSMENT CRITERIA

September 12, 1996

Revised February 2000

PREAMBLE

The Rideau Waterway Land Trust Foundation Inc. is a non-profit organization dedicated to preserving the inherent values of the Rideau Corridor for future generations. In its mandate, there are three areas of interest. In its incorporation documents, RWLT has stated interest in lands of natural, historic, or aesthetic value, which occur within the geographic area of the Rideau Canal and the Tay Canal, collectively known as the Rideau Corridor or Rideau Waterway.

This system recognizes that shoreline lands are key components of ecosystems that are both land and water based. These lands provide habitat for many species of plants and animals. At the same time, they form the basis of an important historical and recreational corridor, thereby providing social benefit and financial benefit from tourism. A mosaic of shoreline uses, including permanent homes, cottages, and farms are evident within this corridor. Shoreline lands serve as drainage areas for the waterway itself, and thus different uses can affect water runoff. Groundwater recharge can also be affected by land use. Many unique and distinct land features are also located within the Rideau Corridor.

The RWLT will employ a variety of means to preserve natural, aesthetic, or historic values for the future. These means will range from working with other organizations to encourage effective stewardship of private lands to outright purchase of significant properties. In view of the variety of parcels of land within the area of interest, and the need for an effective yet efficient program of land protection, a means of determining priorities is essential. For this reason, the RWLT has developed a list of criteria for each of the three areas of interest. The RWLT initially planned to produce a numerical scoring system for ranking lands of interest, however, the inflexible nature of such a system and the problems of equivalence of scoring between the three areas of interest, has led to the adoption of a hierarchical grouping of criteria. Essential qualities appear at the top of each list, followed by desirable qualities, and then advantageous qualities at the bottom. As a corollary to these, there is an additional list of undesirable or unacceptable qualities that may exclude a property from further consideration.

This list of criteria is intended as a guide to enable comparative assessment of sites. Within a specific area of interest (natural, aesthetic or historic), candidate properties must exhibit significant qualities at the top of a list to receive further consideration. In the event that properties exhibit significant qualities in two or more areas of interest, these properties will be ranked as top priority. RWLT will endeavour to preserve properties that represent the three areas of interest. Of necessity, considerable discussion will revolve around comparative values across areas of interest.

It is important to note that this is a “living document” which will be fine-tuned by exposure to actual properties and sites.

CRITERIA

Rideau Waterway Land Trust has established Criteria to be used as a guideline for evaluating candidate properties for land protection. The Criteria have been categorized into the following separate tables:

Natural Value
Aesthetic Value
Historic Value
External Influences
Adverse Conditions

The first three tables reflect RWLT’s Mandate. They list Criteria indicative of natural, aesthetic and historic values. The fourth table lists external influences. These are positive factors particular to a property, which may make acquisition/protection more favourable due to financing, location, or potential. The fifth table lists several different types of adverse criteria or conditions, which may negatively influence the Land Trust’s decision to become involved with property acquisition.

DIVISION OF CRITERIA WITHIN TABLES

The Criteria listed in each of the tables below have been divided into three categories for quick reference. They are defined as follows:

- | | |
|------------------------------|---|
| 1° (primary) / essential | These are the most important qualities fundamental to the Mandate of RWLT. |
| 2° (secondary) / desirable | These are all important qualities which add to the “value” of the property, making it more desirable to the Land Trust. |
| 3° (tertiary) / advantageous | It would be advantageous for a property to have these extra qualities. |

CANDIDATE PROPERTY DECISION PROCESS

The decision making process for evaluating properties for protection and acquisition shall be threefold:

- Property evaluation and recommendation
- Determine financial implication
- Board Decision

1. ASSESSMENT

Evaluation of potential acquisitions by the Property Committee will be based on the site assessment. To be considered as a priority project, a property must have at least one primary / essential quality and no overriding adverse qualities. Wherever possible, criteria are based on fact. A recommendation will be prepared by the Committee for consideration by the Board of Directors.

2. FINANCIAL CONSIDERATIONS

Any recommendation for action regarding a candidate property must first be analysed by the Fundraising Committee and the Treasurer. Initiation of a project may involve short or long-term fundraising/or search for services of donations-in-kind. It is mandatory that the RWLT feels confident that the financial resources to pursue any acquisition can be made available. A recommendation will be prepared for consideration by the Board of Directors.

3. BOARD CONSIDERATION

The Board of Directors will consider the recommendations of the Property and Fundraising Committees and the Treasurer. Because there is the potential for evaluations based only on an initial assessment to overlook unique characteristics and subtle differences between properties, the results of the criteria evaluation will be reviewed by the Land Trust Board. There may be several candidate sites available for acquisition, therefore, the Board would have to balance the results of the evaluation with qualitative comparisons based on personal knowledge. This technical evaluation will be made in conjunction with a review of the financial implications of the acquisition. The respective Committees and staff will then implement the Board's decision.

PROPERTY:			
SIZE & DESCRIPTION OF PROPERTY:			
Special conditions of access:			
BUILDINGS PRESENT:			
LEGAL DESCRIPTION:			
OWNER / CONTACT NAME:		Phone:	
MAILING ADDRESS:			
EVALUATION SUMMARY			
Assessment by:		Date of Assessment:	
VALUE	TOTAL VALUE SCORE # (checkmark) YES		
	1°	2°	3°
NATURAL			
AESTHETIC			
HISTORIC			
EXTERNAL INFLUENCE			
TOTAL EVALUATION SCORES			
ADVERSE CONDITIONS:			
SUGGESTED MANAGEMENT / BEST USE OF PROPERTY:			

NOTE: Significant comments and additional property details may be listed on the reverse.

ADDITIONAL PROPERTY INFORMATION:

NATURAL VALUE			
#	SPECIFIC QUALITY	YES (check)	
N1° 1	Provincially Significant Wetland – (Class 1, 2 or 3 wetland) (if yes – check and go to # N1° 7, because #2-6 are likely already included in Class 1, 2 or 3)		
N1° 2	Natural unaltered shoreline		
N1° 3	Known good fish/wildlife habitat; eg. adjacent spawning beds, beaver/muskrat lodge, moose feeding area, deer yard, etc.		
N1° 4	Known breeding, staging, or nesting sites; particularly of rare, threatened, or endangered species		
N1° 5	Mouth of creek or river; junction of aquatic habitats		
N1° 6	Important hydrological area – recharge / discharge area		
N1° 7	ANSI, or part of an “Area of Natural and Scientific Interest”		
N1° 8	Important geological interest; eg. Syncline, outcrop, blend, unconformity, fossils, etc.		
N1° 9	Unique biome; eg. mature forest, old forest, locally rare plants, etc. (size: _____)		
N2° 1	Class 4 or 5 Wetland – Regionally significant		
N2° 2	Partial wetland / wetland < 5 acres in size		
N2° 3	Frontage along narrow channel of waterway		
N2° 4	Connectivity; eg. part of a corridor link between quality or diminishing habitats		
N2° 5	Local presence of rare / uncommon / unusual species		
N2° 6	Mix of habitat / edge / high biotic diversity		
N2° 7	Representative biome or habitat; quality example, typical of region		
N3° 1	Class 6 or 7 Wetland – Locally significant		
N3° 2	Prime agricultural land, on waterfront; possibility of agricultural lease		
N3° 3	Managed forest, on waterfront; possibility of harvest agreement		
NATURAL VALUE – TOTAL SCORES		1°	2°
			3°

AESTHETIC VALUE			
#	SPECIFIC QUALITY		
		YES (check)	
A1° 1	Highly visible: site is at, or immediately adjacent a visited / traffic area, a junction of waterways, near an island, or a lockstation		
A1° 2	Site has visual interest and can be seen from a lockstation (even if distant)		
A1° 3	Unique / distinct landscape; eg. outcrop, bluff, bay, point of land at water level, high hill with “distinct feature”, sandy beach waterfront, rocky shoreline, etc.		
A1° 4	Viewscape / wide-angled view; eg. property on a point of land		
A2° 1	Viewscape related to time and distance from which a property can be seen; eg. lake location, where property can be seen for a long time and distance as one approaches from either direction by boat		
A2° 2	Landscape which provides seasonal appeal; eg. flowers, leaf colour, etc.		
A2° 3	Aesthetic “man-made” feature / development; eg. building, marina, etc. which blends with the surrounding landscape (as opposed to being an “eyesore”)		
A2° 4	Harmony of neighbouring uses; eg. no stark contrasts, conflicts of use / appearance, no intrusive visual objects / noise; eg. traffic, development, excessive or disturbing human uses		
A3° 1	Remnant of “wild” frontage in developed / developing area		
A3° 2	Representative of local land use; eg. well-managed farmland, riparian buffer zone, etc.		
AESTHETIC VALUE – TOTAL SCORES		1°	2°
		3°	

HISTORIC VALUE			
#	SPECIFIC QUALITY	YES (check)	
H1° 1	LACAC designation / historical society / Parks Canada, etc. documentation of significant building or site		
H1° 2	Significant age; eg. property or original structure dating back to canal building, or predating the canal		
H1° 3	Building or site located at, or adjacent a lockstation		
H1° 4	Restored historical building; period piece		
H1° 5	Site of historic significance; eg. military, trade route, steamboat docking, etc.		
H2° 1	Archaeological site / ruin / artifacts		
H2° 2	Native heritage significance		
H2° 3	Signature building; archetypal / epitome of area of locality		
H3° 1	Century farm		
H3° 2	Location; part of cluster of like architecture / near other historic buildings or locations / solitary		
H3° 3	High visibility		
HISTORIC VALUE – TOTAL SCORES		1°	2°
			3°

EXTERNAL INFLUENCES			
#	SPECIFIC QUALITY		
		YES (check)	
E1° 1	Landowner wishes to donate property		
E1° 2	Land transaction costs would be minimal		
E1° 3	Property is offered with a gift of funds adequate to cover maintenance and/or stewardship costs		
E1° 4	No land taxes – rebate program applicable		
E1° 5	Municipal zoning favourable for land protection at this site		
E2° 1	Land taxes reasonably low		
E2° 2	No immediate maintenance or restoration required		
E2° 3	Offer of “Partnership” to acquire property; eg. may be shared costs, or agreement to manage after acquisition, etc.		
E2° 4	Land at risk of being developed if not conserved		
E2° 5	Acquisition would be a “representative parcel” from all eligible land types – eg. natural wetland, natural upland, historic building, historic site q/o building, aesthetic natural, aesthetic man-made, etc.		
E2° 6	Property has easy access via road, or highly visible water access – eg. rock shoal, sandy bay, etc.		
E2° 7	Property has features underrepresented in local protected sites (eg. RVCA, etc.) – value in establishing protected land in this area (contributes to sense of broad geographical distribution)		
E2° 8	Project likely to stimulate public funding and support		
E2° 9	Property adjacent another protected site – value in extending land protection		
E2° 10	Property may be part of a connecting linkage – eg. may have the potential to create a “public greenbelt”, buffer zone, or wildlife corridor		
E2° 11	Landowner wishes to donate property for tax receipt, but property would not necessarily meet Criteria; however, it is marketable and an agreement to put it up for sale can be arranged with proceeds to other acquisitions		
E3° 1	Property has recreational potential		
E3° 2	Property has educational / research potential		
E3° 3	Inventory work / scientific study on site / background material		
E3° 4	Neighbouring uses compatible with RWLT interests		
EXTERNAL INFLUENCES – TOTAL SCORES		1°	2°
			3°

CONDITIONS THAT MAY NEGATIVELY INFLUENCE RWLT’S DECISION TO BECOME INVOLVED WITH PROPERTY ACQUISITION

REFERENCE: The following list of Adverse Conditions are taken directly from “Nature Conservancy of Canada” documentation.

ADVERSE CONDITIONS			
#	GENERAL PROPERTY CONDITION	COMMENTS	YES (check)
adg 1	Distressed vegetation, or any areas that are bare for no apparent reason		
adg 2	Unusual odours		
adg 3	Stains (unusual or around areas where chemicals are stored / used)		
adg 4	Evidence of dumping		
adg 5	Trash or other debris		
adg 6	Drains		
adg 7	Any unusual depression or mounds		
adg 8	Any sheens or unusual colours on the surface of any water bodies		
adg 9	Piping / vents for underground storage tanks		
adg 10	Ditches, pits, ponds, lagoons, clarifiers, oil / water separators, surface impoundments, or sumps on the property		
#	STORAGE DRUMS	COMMENTS	YES (check)
ads 1	Are there any storage drums on the property		
ads 2	How many		
ads 3	Are they empty		
ads 4	What is / was in the drums		
ads 5	Any evidence of leaking		
ads 6	Will the drums need to be removed		
ads 7	Describe the area around the drums		

#	WELLS / TANKS	COMMENTS	YES (check)
adw 1	Are there, or were there any above or below ground storage tanks on the property		
adw 2	Is the tank above ground, or underground; age; size		
adw 3	What was / is stored in the tank		
adw 4	Is the tank still there – if not, what are details on removal		
adw 5	Have any permits been obtained for the tank (review)		
adw 6	Has the tank and associated piping ever been tested (include results)		
adw 7	Describe the area around the tanks; identify any evidence of leaking or spilling		
adw 8	Does the property contain any SEPTIC tanks or fields		
adw 9	Are they in use or abandoned		
adw 10	Did they receive any industrial materials – discuss		
adw 11	Are there any WELLS on the property		
adw 12	What type and how used		
adw 13	Wells in use or abandoned		
adw 14	Wells locked or protected		
adw 15	Has well water ever been tested – attach results		
adw 16	Have there been any complaints about the quality of the water or flow rate (discuss)		

#	TRANSFORMERS	COMMENTS	YES (check)
adt 1	Are there any transformers located at the property pole-mounted or pad-mounted)		
adt 2	Types of devices and who owns them		
adt 3	Are they labelled as containing PCBs, or being PCB free		
adt 4	Is there any evidence of leaking or damage		
#	MINERAL / PETROLEUM OPERATIONS	COMMENTS	YES (check)
adm 1	Have there ever been any oil or gas wells, or other mining activities on the property		
adm 2	Type of operations on the property		
adm 3	Where were the wastes from such operations disposed of		
adm 4	Are there any oil or gas pipelines		
adm 5	Has the pipeline leaked – details		
adm 6	Identify the owner or operator of any well, mine, or pipeline		
adr 1	Has a RADON test been performed in any building at the property – results		
ada 1	Is there any evidence of materials that are likely to contain ASBESTOS – check roof, exterior, pipe coverings, spray-on fireproofing, cement sheet		
ada 2	Describe types, amounts, and condition of materials (intact or deteriorating)		
adfg 1	Has FILL ever been brought on the property – where was it placed, when and from where did it come		
adfg 2	Has there been any GRADING or disturbance to the soil; why		
TOTAL NUMBER OF ADVERSE CONDITIONS			

REFERENCES

Creating a Land Preservation Strategy. Gene Duvernoy, Attorney and Engineer, Seattle King County Land Conservancy (WA).

Creative Conservation. Hilts, Stewart and Ron Reid. Federation of Ontario Naturalists. 1993.

Criteria for Evaluating Land Protection Proposals. Potawatomi Land Trust

Introduction to Conservation Easement Stewardship: “Remember Perpetuity is a Very Long Time” the San Juan Preservation Trust. 1994.

Natural Heritage Evaluation of Muskoka. Reid, Ron and Bonnie Bergsma. Muskoka Heritage Areas Program. February 1994.

Nature Conservancy of Canada Criteria

Ontario Wetland Evaluation System, Southern Manual. Ontario Ministry of Natural Resources. 1993.

Rideau Canal Management Plan. Canadian Heritage, Parks Canada. 1995.

Part 4

Land Valuation and Taxation

By Ian Attridge

September 2003

PART 4 - LAND VALUATION AND TAXATION

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LAND VALUATION AND TAXATION

At some point during the negotiation process, a land trust and the landowner will want to know what the property is worth. Determining the property's value is thus a critical element in a transaction. Income, property, and other taxes are inevitable costs of owning and transferring land, and their extent is largely related back to the value of the property.

Since no one likes to pay more taxes than necessary, being aware of tax mechanisms that levy or reduce taxes paid are important both to the land trust as property owner and also to encourage conservation and especially donation of land by landowners. The variety and availability of tax benefits will depend upon the type of conservation technique and owner involved. Accordingly, this chapter deals with how to value land and partial interests in land (such as conservation easements), and then with land-related tax measures. Besides taxes, additional fees involved in the land securement process may also include those for legal or tax advice, preparation of a survey or appraisal, and registering documents at the land registry office.

4.1 Determining the Value of Land

Each property and partial interest is a unique combination of characteristics, including location, features, size, history, current use, and permitted uses. Along with personal preference, these and other factors contribute to the value of land. Determining this value is a regular and fundamental activity in our society. Value is certainly much more than monetary or economic value; there are ecological, spiritual, and emotional aspects that may well determine a landowner's or land trust's decisions about land, much more than the property's sale value. Nonetheless, market value—the price a property would fetch on the open market after a reasonable period—is the main way purchases and tax aspects are assessed.

4.1.1 Appraisals and Opinions of Value

Determining the market and tax value of a property is most often done through preparation of an appraisal. An appraisal is a considered opinion by a qualified appraiser about the value of the land interest under consideration.

An appraisal is important or useful in several circumstances:

- to determine the purchase price you are prepared to pay or accept;
- to value a donation in order to issue and claim a charitable tax receipt;
- to propose a property tax reassessment;
- to report the asset value on financial statements;
- to substantiate acquisition costs to donors, grant makers, board members, the public, etc.;

- to maintain credibility and demonstrate responsibility in the conservation and broader community;
- to calculate, in some cases, the charity's "disbursement quota" relating to its required percentage of charitable expenditures under the *Income Tax Act*; and
- to set the bar for future acquisitions (i.e., if the land trust pays too much for the first property, other nearby landowners will expect the same price).

Appraised value is based on a wide range of factors. The fair market value is not limited to the current use of the land but involves a consideration of its potential "highest and best use," based on the notion that a buyer is prepared to pay for the potential value of the property. Thus, the determination of the most profitable, legal, and likely use is the key consideration. Introductions to how this is done and who can appraise land are found below.

Good appraisals will help to maintain landowner confidence, will provide answers to questions raised by legislators and the public, will withstand scrutiny by [tax authorities] in the case of land trust programs, and maintain integrity of a [conservation easement] or other land conservation program. To function at its best, the appraisal process requires competent appraisers and reviewers as well as an informed user of appraisal services.⁷

Appraisal Process

The appraiser may be hired by the landowner or by the land trust. Generally, it is the landowner's responsibility to report property values for tax purposes and thus this person may wish to hire the appraiser. The donor also will likely want to know in advance what the tax consequences will be. For a purchasing or donee land trust (the latter with responsibility to issue a tax receipt), there are several reasons why the organization would want to retain the appraiser itself: to control the quality of the appraisal and correct mistakes; as one way to regulate the timing of the appraisal (e.g., to follow the registration of the interest because landowners may cancel a deal if they do not like the appraisal numbers),⁸ and to establish an ongoing relationship with an appraiser and help develop expertise, especially with new approaches like conservation easements.

⁷ Patrick W. Hancock, *A Question of Value: Appraising for Farmland Preservation*, Farmland Preservation Special Report (Street, Maryland: Bowers Publishing, 1992), p.8. Reproduced As Appendix "C" in: Deb Brighton and Davis J. Cable, *Taxation of Land Subject to Conservation Easements in Vermont: A Lister's Guide* (unpublished report prepared for the 1992 "Taxing Conservation Workshops", available through the Vermont Land Trust, Montpelier VT).

⁸ However, donations are voluntary, and donee organizations will want to ensure contented donors. Another approach to that suggested in the text could be to structure within the agreement to acquire the property how the value will be determined, such as sharing an appraisal and then commissioning a second appraisal and averaging the two if there is no agreement. This gives the donor recourse should there be a problem or disagreement with the donee's appraisal. James Catterton, Walden Associates Inc., personal communication, 25 October 1996; Alan Ernest, Conservation Support Services, personal communication, 12 November 1996.

Regardless of who pays for and who retains the appraiser, one should expect analysis, not advocacy, on the part of their appraiser, who is bound ethically and legally to render a [thorough], disinterested, objective, supportable estimate of value.⁹

The timing of the property appraisal varies with the land securement option, but generally occurs earlier on in the negotiation process. Appraisals are usually carried out before you sign an Agreement of Purchase and Sale, or otherwise commit to a purchase; the land trust wants to know what is a reasonable price first or the landowner wants to know the value of the potential tax receipt. An alternative is to insert a condition in this agreement that the subsequent appraisal will support the purchase price. For fee simple donations or conservation easements, ideally the donor is acting on their desire to conserve the property, with the tax aspects of lesser consequence. In some cases, the appraisal can be completed after the donation or easement has been completed.

Involving an appraiser early in the process can prevent any financial surprises in a land transaction. Providing information to the appraiser can also save appraisal time and expense. Such information might include deeds, surveys, tax rolls, current zoning, comparable sales, or details of the property's features and capabilities.¹⁰ An appraiser will often provide a draft opinion, and then follow this with a final opinion based upon the final arrangement. In the appraisal, the appraiser will typically provide an introduction and summary of important facts and conclusions, a description of the property and its neighbourhood,¹¹ analysis of highest and best use, approaches to value, and the final value reconciliation.¹²

Before selecting a local accredited appraiser to appraise a property's value, it may be useful to review the owner's municipal tax assessment notice. While tax assessments are not necessarily accurate reflections of market value, they can provide a ballpark value with which to begin discussions with landowners. In many cases, the land trust knows of local appraisers who have done previous work for the organization, or can ask other conservation organizations to recommend good appraisers in the area and then interview them and ask about their expertise. Reference can also be made to the Appraisal Institute of Canada's *Directory of Designated Members*, published annually.

9 James L. Catterton, "Appraising Conservation Easement Gifts: a Primer for Landowners", Summer 1990 *Exchange* 4-7 at P.4, Reproduced in James L. Catterton, "Advanced Appraisal Issues" (Topic 6j), *National Rally '96 Workbook* (Washington, DC: Land Trust Alliance, 1996).

10 James L. Catterton, note 3 above, at p.6.

11 An appraiser may need help with identifying the existence, type, location, extent and significance of wetlands and other natural or cultural features affecting value, since they are not necessarily well-versed in these fields, but only in ascribing values once these features are known.

12 National Trust for Historic Preservation and the Land Trust Alliance, *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements*, 2d ed. (Washington, D.C.: National Trust for Historic Preservation and the Land Trust Alliance, 1990), at p. 18. Also see USPAP Standard 2.

Appraisal costs will vary depending upon the detail and complexity of the transaction, the type and extent of land and buildings involved, and the availability of data to provide comparisons and calculations of value. The cost of an appraisal report prepared by an AACI accredited appraiser can range from \$500 to perhaps \$5,000 or more. While the land trust may wish to retain and direct the appraiser, the landowner might still be approached to pay for it by making a donation to the land trust. In some cases, the appraiser may be willing to be paid and then donate all or a portion of this fee back to the land trust.

The following outlines a recommended process for requesting appraisal services. Generally, at least two competitive bids should be solicited. Always discuss the appraiser's credentials and area of expertise before selecting an appraiser; this is especially important for appraisals of conservation agreements. Appraisers who have experience valuing expropriations, pipeline, or utility easements are familiar with the methodology required to appraise a conservation agreement (the "before and after" method). Often, experience costs more, and their bid may be higher than a competitor. Base the decision on which appraiser to use on all of these factors, not just the price.

Call the appraisers to be solicited, before sending out bids, to discuss the securement project and the appraiser's role (e.g., whether to determine the purchase price, value of a donation, value of a conservation easement, etc.). Ask if the appraisal can be completed within your estimated timelines, whether the appraiser offers discounts for charitable groups, how much time the appraiser will require to submit the bid, etc. The request for appraisal services can be faxed or e-mailed, with a hard copy following by mail, to speed up the selection process (for a model letter, see Appendices A and B). It is best to provide written authorization to proceed once the appraiser is selected. Notify the other appraisers in writing that while they were not selected this time, the land trust will keep their names on file for future projects.

Sometimes a full appraisal may not be required. An Opinion of Value is a less comprehensive analysis and is based on the person's detailed knowledge of the real estate market in the area or of the property. A land trust may choose to obtain an Opinion of Value in situations where:

- the value of the property is fairly low (for example, less than \$25,000);
- minor changes in value must be taken into account for properties recently appraised (e.g., for a new use under a conservation easement);
- very similar properties are being considered in an area with an established and well-documented market;
- the appraiser has previously appraised the property;
- or the use of the Opinion of Value is for purposes which do not require a more detailed analysis of the property's value. An Opinion of Value is generally not used to substantiate a tax receipt.

Types of Persons Who Can Value Land

There are no specific requirements as to who can appraise property. So long as the data is supportable and the number is reasonable, people can conduct comparison sales research and determine the value themselves. However, having a professional designation carries more authority and credibility. Indeed, in tax appeals the tribunals have demonstrated their preference for appraisers who are expert in the particular interests and market under scrutiny. In an income tax appeal, the onus is on the taxpayer to prove that the Minister of National Revenue's valuation was incorrect.

For appraisals of gifts, Interpretation Bulletin IT-297R2 states:

The person who determines the fair market value of the property must be competent and qualified to evaluate the particular property being transferred by way of a gift.¹³

Some real estate agents appraise the value of land, but the most qualified appraisers who are held to the highest professional standards are those who are full members of the Appraisal Institute of Canada and are designated as Accredited Appraiser Canadian Institute (AACI). Nonetheless, not every appraiser or member of AACI will be familiar with appraising conservation easements, life estates, or the local market, and thus a qualified, experienced appraiser should be sought.

If a property or interest such as a conservation easement is less than \$1,000 in value, the appraisal can be carried out by the recipient land trust, and thus an independent person need not be hired.¹⁴

Nature Conservancy's Appraisal Thresholds

Nature Conservancy of Canada has adopted a policy with thresholds for determining whether an appraisal is required, and to what extent. These thresholds require an appraisal by an AACI-accredited professional in the following circumstances: for all properties and interests where an income tax receipt is to be issued; and where a purchase price or donated value is greater than \$25,000. A second appraisal by an independent AACI-accredited appraiser is required for properties worth more than \$1 million. An Opinion of Value from a local realtor may be used where the purchase price is likely to be less than \$25,000.

¹³ Revenue Canada, *Interpretation Bulletin IT-297R2*, para.6.

¹⁴ Revenue Canada, "Gifts and Income Tax" (Who Should Appraise A Gift?), Publication P113(E) Rev. 96 1920, p.13.

Appraisal Approaches

The appraisal of the land's value, or a component such as a conservation easement, is an art practiced by following certain appraisal approaches. Different appraisers may come to different conclusions about a property's value using these approaches. This part of the chapter will introduce these approaches and emphasize the professional procedures and standards of the Appraisal Institute of Canada and the *Uniform Standards of Professional Appraisal Practice* (USPAP).¹⁵ An appraisal by a qualified appraiser that follows such standards will be particularly important to substantiate claims to governments concerning income and property taxation.

Across North America, appraisers regularly use three traditional approaches to determining the market value of a property: the comparable sales, cost, and income approaches.¹⁶ Each of these methods has its own strengths, weaknesses, and particular applications. An appraiser will determine the highest and best use for the property, then apply usually more than one of these approaches to a particular property, and then compare, appropriately weigh and reconcile the resulting values produced in order to report one final appraised value.

The **comparable sales** or market data approach examines recent sales of similar properties in the same or comparable markets as the land in question. This data may be available from property owners in the area, real estate brokers, lending institutions, declarations of value at title registry offices, property tax rolls, and appropriate land interest associations (e.g. farmers', hiking, or woodlot owners' associations). To compare properties, adjustments in value on a lump sum, per unit area or percentage basis can be made to take into account variations in comparable properties' characteristics. When making adjustments from comparable sales, it is important that the appraisal demonstrate that such factors were analyzed, that it focus on sales that were actually made (rather than on mere contracts or offers), and that comparable sales do not differ too greatly in price from the property under consideration. The comparable sales method is the most reliable approach when there are frequent sales and a well-established market for comparable properties, including those of somewhat superior and inferior quality.

The second method of valuing land, the **cost approach**, examines the cost to replace or reproduce the "improvements" on a site and adds to them the market value of the land. These improvements are usually structures, and thus this approach may not be very useful for open-space lands but could be important for buildings of historic or scenic interest.

¹⁵ The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* ("USPAP") (Washington, D.C.: The Appraisal Foundation, 1996), incorporating the 1996 USPAP Canadian Supplement provided by the Appraisal Institute of Canada.

¹⁶ These three traditional approaches to value are reflected in the requirements to collect data under USPAP Standards Rule 1-4.

Third, the **income approach** involves an assessment of the net income that could be generated from a property, and reduces this amount to a present value using a discounting percentage. This approach is best applied to such properties as farms, resource or recreational lands, retail or commercial buildings, or rental dwellings, where income determinations are key and can be based upon reliable market data such as commodity production rates and prices, rents, occupancy rates, and operating expenses.¹⁷

Two methods can be used to calculate the tangible net income or return to the land under this approach.¹⁸ The Cash Rental Approach analyzes cash rental rates paid for land. The more complex Build-Up Approach examines typical income potential (from crop rotations, yields, and commodity prices), minus variable and fixed expenses and management costs, to determine the net income. Accurate calculation and future projection of net income and determining an appropriate capitalization rate are two inherent yet challenging tasks using this method.¹⁹ Thus, the income approach must be applied with care.

A fourth blend of the traditional cost and income approaches is the **subdivision or cost of development approach**. Here, the appraiser estimates all direct and indirect costs and entrepreneurial profit and deducts these from projected gross sales prices of finished lots for development.

4.1.2 Conservation Easements and Other Partial Land Interests

Over time, appraisal methodology has been developed and largely standardized; it applies to the estimate of the value of a conservation easement or other partial interest as much as it does to any other real property. Yet some adaptations or special considerations have been developed to deal with these interests. A brief overview is provided here.²⁰

Appraising the value of a conservation easement remains difficult for several reasons. First, conservation easements are a new tool throughout Canada, and thus there are few examples of sold or donated easements, or lands subject to easements, with which to compare values. Second, easement terms will vary considerably depending upon the land's features, the extent of the restrictions, their effect on value, and owner and holder

¹⁷ Lonnie Goldman, "Conservation Easement Appraisal Methodologies and Their Acceptance by the Courts", *The Back Forty*, Vol. 6(1), 1995, at p.5.

¹⁸ Serecon Valuation and Agricultural Consulting Inc. (Edmonton), *Appraising a Conservancy Easement and a Profit à Prendre* (Stonewall, Manitoba: Ducks Unlimited Canada, 1995). at p.37. See also pages 14-20 which examine approaches to determining fixed costs and capitalization rates.

¹⁹ Goldman, note 11 above, at p.5.

²⁰ For more detailed discussion, see: Ian Attridge, *Conservation Easement Valuation and Taxation in Canada* (Ottawa: North American Wetlands Conservation Council - Canada, 1997).

needs. Thus easements will be difficult to compare. Third, other interests (such as common law easements, covenants and leases, or utility rights-of-way) have often been used for different purposes with different conditions and value implications, thus frequently limiting their usefulness in providing comparable values. Fourth, and of considerable significance, there is rarely a conventional "market" for them, but rather easements are most often donated to governments or conservation charities. Finally, once easements are acquired, they are usually intended to be held in perpetuity and not subsequently transferred. As a consequence of these difficulties, appraisal methodology must be adapted to these circumstances.

The appraiser's analysis will necessarily pay careful attention to each of the terms in the conservation easement and their effects on value. Obviously, then, before obtaining a final appraisal, the negotiations with the landowner will need to progress to the point where the key components of the conservation covenant or easement are settled. The appraiser should also note the retained rights or what may be *allowed* by the easement, since this would accurately portray the manner in which the property would be marketed to potential buyers, with the seller or broker accentuating the positive.²¹

Because there is usually not a well-developed easement market to allow comparison sales, the indirect "before-and-after" method of determining value is often used. The before-and-after method is essentially two appraisals in one: it determines the value of the property before a conservation easement is put in place, and then assesses the value of the property subject to the easement. The difference is then taken to be the value of the easement itself. For each of the before and after values, the traditional approaches to appraising land are used.

In developing a real property appraisal, professional appraisers are directed to consider easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature; [and] consider whether an appraised fractional interest, physical segment, or partial holding contributes pro rata to the value of the whole.²²

Using the comparable sales method may be most appropriate for open space easements. While there may be limitations in direct comparison sales of easements, comparable sales with other physical or legal encumbrances can be used to estimate values of easement-encumbered lands. These restrictions can include rights-of-way, power line or other utility easements; lands with physical limitations due to topography, water supply, rockiness or flooding;²³ being landlocked or a poor configuration or size; or zoning, deed restrictions, and other legal controls which present similar constraints on development as those found in the easement's terms.

21 Hancock, note 1 above.

22 USPAP, Standards Rule 1-2, (c) and (d).

23 While useful for comparisons, many physical constraints may not be permanent and can be overcome by current or future technology, whereas conservation easements are usually intended to be held in perpetuity. Brighton and Cable, at p.6.

In appraising an easement property, an appraiser must also consider any value enhancement or decrease that might occur on the "larger parcel," namely that portion of a property or properties with contiguity and unity of ownership and use. An easement on a portion of a larger parcel, or next to property owned by the same owner or her family, may enhance the value of this "larger parcel," such as by retaining open space, views, recreational access, privacy, and seclusion. It could also diminish the value by blocking access or utility easements, creating a nuisance from public access, or restricting some future use.²⁴ This is a particularly difficult and subjective aspect of the easement's value to assess.

Until 1997, there were some outstanding questions as to how conservation easements were to be valued for income tax purposes. The 1997 federal budget and later amendments proposed in 1999 have since clarified and simplified the method of determining the value of donated conservation easements. The legislation adopted the before-and-after method for those easements certified on ecologically sensitive lands. Note that other types of easements which are not ecological gifts (e.g., conservation easements on qualifying land but which are not donated through this program, or other types of easements for agricultural or heritage conservation purposes) will not have the benefit of these formal rules. It could well be argued that they should receive equivalent treatment, nonetheless.

As a rough estimate, a conservation easement may be worth between 25 to 50 per cent of the full title value. If public access is involved or there is a significant commercial resource base on the property that becomes restricted, the percentage may be much higher as a proportion of the full land value. Conversely, an easement on a part of a property or which mirrors current uses and restrictions may be worth a much smaller percentage.

It will be some time before the profession in Ontario becomes comfortable and experienced with appraising easements. Due to this limited experience with such specialized interests, a qualified appraiser to appraise the value of a conservation easement may be best found through recommendations from other conservation organizations and careful interviews.

4.2 Income Tax Considerations

A whole host of income tax considerations may affect a transaction in which a land trust is involved. Various creative arrangements for donating land may be attractive to the landowner or for the land trust to promote. In part, these may depend on whether the transaction is a true gift for income tax purposes. There are also substantial liabilities, such as capital gains tax, which are important considerations in dealing with land.

²⁴ M. Eugene Hoffman, "Appraising Deductible Restrictions", in: Russell L. Benneman and Sarah M. Bates (eds.), *Land Saving Action* (Covelo, California: Island Press, 1984), p.203; and Catterton, note 3 above, at p.6.

Nonetheless, there may well be significant tax benefits from making donations, and thus landowners should be encouraged to explore tax issues early on in a transaction.

This chapter cannot hope to cover all of these issues and, in many cases, it is really the landowner's responsibility to deal with them. Accordingly, it is always wise to advise the other parties with whom you are dealing to get independent, professional advice about tax matters. If necessary, Revenue Canada can be approached to provide, for a fee, an advance tax ruling on a particular arrangement.

4.2.1 Characterizing Transactions: Gifts and Otherwise

Determining whether a particular transaction constitutes a gift or not has important implications for the donor and the land trust. For the donor, only the value of a true gift can be claimed for a tax credit or reduction. For the land trust, it can only issue a tax receipt for a true gift; it thus will usually seek to structure its transactions accordingly in order to provide this incentive to its donors. What technically constitutes a gift for income tax purposes is best explained through the following information, condensed from Revenue Canada's *Interpretation Bulletin IT-110R3*.

Generally, the term "gift" is not defined in the *Income Tax Act* and as such its common law definition is used. Thus, for purposes of sections 110.1 and 118.1 of the *Income Tax Act*, a gift is considered a voluntary transfer of property without valuable consideration. Generally a gift is made if all three of the conditions listed below are satisfied:

- (a) some property is transferred by a donor to a registered charity;
- (b) the transfer is voluntary; and
- (c) the transfer is made without expectation of return. No benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value. A tax credit or tax deduction is not considered to be a benefit within this test.

There are certain exceptions and subtleties to this general rule. Generally, any legal obligation (such as a contract or condition of a governmental approval) on the payer to make a donation would cause the donation to lose its status as a gift. However, when a taxpayer honours a personal guarantee concerning a loan made to a charity or honours a pledge to make a donation, this act can be considered to be a gift if the obligation was entered into voluntarily and without tangible reward or "consideration." A charity also may not issue an official receipt for income tax purposes if the donor has directed the charity to give the funds to a nonqualified donee. For-profit organizations, individuals, and most foreign charities or foreign affiliates of Canadian charities are not qualified donees, and thus gifts directed to them are not eligible for an official receipt.

In some circumstances, a donor can both purchase something from a charity and make a gift (i.e. a bargain sale). There must be two separate transactions independent of

each other. Where the donor can only purchase the item if a contribution is made, that contribution is not a gift and an official receipt may not be issued for it. Currently, the sale of property at less than fair market value is not considered a gift and must be structured in particular ways in order to qualify for a tax receipt (see the discussion of bargain sales in Section 2). The acceptable practice of using “split receipts,” being a receipt for the difference between the purchase price of a ticket to attend a “dinner, ball, concert or show” and the fair market value of the food or entertainment, is seen as one model for tax reform to streamline a bargain sale.

4.2.2 Capital Gains

The disposition of land, whether by sale, donation or conservation easement, by a private individual or corporation will likely involve tax considerations. Selling or donating capital property (such as most types of land) will be deemed a disposition under the *Income Tax Act (Canada)* (ITA, or the act) and therefore trigger capital gains tax liability for the landowner. With donations of land or conservation easements, capital gains tax may be a significant consideration as it can substantially erode the value of the tax credit or deduction. Where land is inventory of a business or an “adventure in the nature of trade” (such as property acquired by a real estate developer), then the property is considered inventory and not “capital” and is thus not subject to the capital gains rules described here.

Disposition of land by individuals may affect fixed income provisions, although with the sale of the land this may be less of an issue for vendors as they have received cash. Loss of fixed income to donors of land or conservation easements may, however, be a significant consideration. In all circumstances, land trusts should recommend that landowners seek independent tax and legal advice.

Capital gains are triggered whenever a capital asset, such as land, has appreciated (increased) in value over time and then are disposed of. Even when a property has been donated, the act treats it as a disposition of capital property at fair market value and the donor is subject to a capital gains tax. The gain is calculated based on the difference between the adjusted cost base (ACB) of the land and the proceeds of disposition (i.e., purchase price or value of the charitable receipt). The ACB is the value of the land as at December 31, 1971 (V-Day) or, if after V-Day, its value when acquired (generally, the price paid). The ACB also includes certain costs associated with the transaction or those for improving the property. Fifty per cent of the gain in value must be brought into income for the year of the disposition, usually resulting in tax payable.

An example of this type of calculation follows. Assuming a marginal tax bracket based on income level of 50 per cent, the current sale of a property for \$100,000 with an original 1975 purchase price of \$20,000 would result in the following capital gains tax:

Proceeds of disposition (sale price)	\$100,000
Adjusted cost base (original purchase price)	\$ 20,000
Capital gain (\$100,000 - \$20,000)	\$ 80,000

Taxable capital gain (@50% inclusion rate)	\$ 40,000
Tax payable (@50% combined tax rate)	\$ 20,000

In a purchase scenario, this would mean that the vendor, for selling a \$100,000 property, would be required to pay Revenue Canada \$20,000 in income tax, but would net \$80,000 in cash. Reducing the sale price (proceeds of disposition) will reduce the tax payable, but will also reduce the net cash received. If the property was donated to a land trust, the donor would still have to pay the \$20,000 in tax (despite receiving no funds), but a tax receipt could be issued for \$100,000 and used for claiming a tax credit or deduction (see the following section).

The current published interpretation by Revenue Canada regarding the calculation of capital gains tax on donations of conservation easements is that the entire value of an easement is deemed to be capital gain. However, this does not conform with Section 43 of the *Income Tax Act* which calls for a reasonable portion of the adjusted cost base for the whole capital property to be applied to a disposition of only part of the property. Accordingly, one is likely to succeed in arguing that the ACB of an easement is equal to the ACB of the whole property multiplied by the proportion of the entire property's current fair market value comprised by the easement. Thus, for a property worth \$100,000 (FMV), originally acquired for \$20,000 (ACB), and an easement valued at 60 per cent of the fee simple interest, the capital gain for the easement is: \$60,000 - \$12,000 = \$48,000.

There are several means to reduce or adjust the capital gains tax payable on land, and a few will be noted here. One should always take a cautionary approach to tax planning and seek expert advice in doing so. First, a new formula in 1997 for calculating a tax credit ensures that a taxable capital gain will not overwhelm the tax credit for donors in the year of the donation. Second, for land gifts, the donor also has the option of claiming the gift at between the fair market value and the adjusted cost base. Thus, a donor can select the optimal value that represents lower capital gains and the correspondingly reduced value of the charitable tax receipt.

A third means to reduce capital gains is a person's principal residence which, if donated, is exempt from capital gains along with up to a half hectare (1.2 acres) of land surrounding it.

Fourth, certain other gifts can be totally exempt from capital gains or have received special capital gains treatment under Section 39(1)(a) of the *Income Tax Act*. Such properties include: certified cultural property (such as a building and the land immediately under it), a Canadian resource property, a foreign resource property, a timber resource property, a beneficiary's interest in a mining reclamation trust, as well as certain financial transactions such as life insurance, debt obligations and a financial institution's mark-to-market property disposition. These may become applicable in specialized situations, as defined in the act.

Fifth, new federal rules for donating publicly traded securities (such as shares) to charities reduce the tax payable by using a capital gains inclusion rate of only 37.5 per cent, rather than the standard 50 per cent rate. This opportunity may be useful to donors as an alternative to donating trade lands which a land trust would then resell. The donation of such shares in a company which holds lands may also be a creative way to transfer land ownership at a reduced capital gains rate. However, without a carefully structured transaction, this latter arrangement may attract the General Anti-Avoidance Rule in Section 245 of the *Income Tax Act*.

Sixth, owners of farm properties still have a lifetime capital gains exemption of \$500,000 and thus can claim capital gains on a donation up to this amount as an exemption from taxation.

Seventh, in some transfers to family members (called a “roll-over”), farmers may be able to defer capital gains to the new owner so that the farmers do not pay the capital gains tax at the time of this transfer. This may increase the burden on the younger generation if they decide to sell the farm, but is an incentive for keeping the land in agricultural use. These methods of dealing with capital gains were intended for other purposes but may be considered in structuring a conservation transaction.

4.2.3 Donation Credits and Deductions

Most land trusts are registered charities and as such are exempt from federal income tax. Charities also have the ability to issue tax receipts to donors for gifts of property.²⁵ It is this latter ability which has encouraged donations of land and other property to charities. For example, a tax receipt can be given in each of the following circumstances where the donors:

- make a straightforward gift of land or a conservation easement;
- sell the land at full price, and then donate back some of the money (sometimes called a “bargain sale”; see Section 2.4.3 of this manual);
- give the land away, but reserve a “life estate,” meaning the landowners can continue to live on the property until they or specified family members die (see Section 2.4.2);
- give the property through a will rather than during their lifetime;
- donate land to the land trust, allow it to sell the property (perhaps after first protecting the land with a conservation easement), and then allow the group to use the proceeds for its conservation work (e.g. buying other land); or
- donate money, equipment, life insurance policies or other articles directly to the land trust to help with its conservation work.

Land trusts are often the most familiar with many of these techniques and can assist landowners with structuring other innovative arrangements.

²⁵ See the *Income Tax Act*, sections 110.1 (corporations) and 118.1 (individuals), for the detailed rules.

Changes to the *Income Tax Act* between 1995 and 1997 have allowed donors to claim the receipted value of their gifts against a larger portion of their annual income, increasing from the general limit of 20 per cent before to 75 per cent now. Where gifts are made of capital property such as land, the limit against which a tax credit may be claimed is the total of (a) 75 per cent of the donor's net income, plus (b) 25 per cent of the taxable capital gains, plus (c) 25 per cent of recapture of any capital cost allowance arising as a result of the gift (see Section 118.1(1) of the act). The 75 per cent net income limit is increased to 100 per cent for donations of "ecologically sensitive lands," where such lands are certified to contribute to the national environmental heritage by Environment Canada (see the following section).

When land or other property is given to a registered charity such as a land trust, the organization may issue the donor a one-time income tax receipt. The donor then attaches the receipt to their income tax return to substantiate a claim to a credit (for individuals) or deduction (for corporations) against their income tax. In appropriate circumstances, claiming such tax credits and deductions can result in significant benefits for donors.

For properties where capital gains tax is not an issue (e.g., they have not increased in value, have been recently purchased, or the owner has dealt with the gain through financial planning), generally the net value of the tax credit or deduction can be estimated at 50 per cent of the charitable receipt value. This is based on an average 50 per cent combined federal and provincial tax credits. Thus, a \$100,000 gift of land would be worth \$50,000 in tax savings to the donor. The resulting tax credit or deduction can be spread over a five-year period after the gift is made, until the value of the gift has been fully claimed. Any applicable capital gains liability would need to be subtracted to determine the net financial result of the donation.

4.2.4 Ecologically Sensitive Lands (Ecological Gifts)

In 1995, the federal government announced that for "ecologically sensitive lands" (also called "ecological gifts") the former 20 per cent annual income limit for claiming a gift's value for a charitable credit or deduction would be eliminated. This allowed donors of such lands to claim their charitable deduction against 100% of their income in the year of the gift and for a five-year carry-forward period after this. This partially removed a significant barrier to charitable gifts of land, as the previous 20 per cent of income limit usually resulted in capital gains tax payable in the year of donation. While capital gains tax may still be triggered on the donation of ecological gifts, no tax would now be payable by the donor since the capital gain is now offset by the charitable credit or deduction. Nonetheless, most ecological and other land gifts will still result in an economic loss to the donor compared with selling the property.

Ecological gifts must be certified by the federal Minister of Environment or a delegated authority of the minister. Also, any change in ownership or use of the donated property must be approved by the minister, otherwise a penalty equal to 50 per cent of its current

value can be levied. In Ontario, this certification and approval authority has been given to the Ontario Regional Director of the Canadian Wildlife Service (CWS), currently Mr. Simon Llewellyn. No other organization has been delegated by the minister to certify ecological gifts in Ontario, although in rare circumstances a land trust could apply to the Director General of the Canadian Wildlife Service in Ottawa, currently Mr. David Brackett. The Ontario Ministry of Natural Resources and CWS have agreed on what specific categories of land qualify, as well as what other types of land might qualify as ecologically sensitive. These criteria can be found in Appendix 4C.

The certification process involves preparing background information on the property and a brief description of how it would meet the criteria noted above. This information is attached to the ecological gifts form, signed by both the land donor and the recipient donee organization, and then forwarded to the CWS Ontario Regional office in Toronto. The material is then assessed and a copy of the form is returned to the landowner to attach to their tax return, along with their donation receipt. The form and a detailed outline of the process are found at Appendices 4D and 4E. More detail on the program and Ontario criteria can be found in CWS's publication *Ecological Gifts: Implementing Provisions of the Income Tax Act of Canada*, by calling the program administrators, or on the program's website: www.ec.gc.ca/cws-scf/habitat/index_e.html.

4.2.5 Documentation Requirements and Penalties

Whether property is donated, purchased or sold, there are general rules for substantiating the value of property for income tax purposes. Certain penalties or other consequences can ensue should claims be unreasonable, and land trusts involved in conservation transactions need to be aware of such implications.

Reported values and calculations for property can be subject to audit and reassessment by Revenue Canada. Consequently, it is important to have sufficient evidence of property value and associated calculations prepared in advance of completing a tax return, such as by having a professional appraisal prepared. Where there has been a recent, previous purchase of property, this can be documented through agreements of purchase and sale or land transfer tax declarations from the time of purchase. In order to obtain tax deductions or credits for donations under the ITA, proof of the gift must be made by filing a receipt containing prescribed information.²⁶ This information includes, for non-cash properties, the date the donation was received, a brief description of the property, and "the name and address of the appraiser of the property if an appraisal is done."²⁷

A variety of consequences for misinterpreting or breaching income tax rules are specified in the *Income Tax Act*, and a comprehensive review of these is beyond the scope of this section. Nonetheless, a few should be highlighted. First and foremost for land trusts is that, as noted above, unauthorized changes in use or ownership of ecologically sensitive land donations can be subject to a penalty tax of 50 per cent of

²⁶ *Income Tax Act*, sections 110.1(2) and 118.1(2).

²⁷ *Income Tax Regulations*, C.R.C. 1978, c.945, paragraph 3501(1)(e.1).

the current value of the land (see Section 207.31 of the act). Thus, seeking approval from CWS for such changes is important. Such penalties also assure donors that there is a strong disincentive to inappropriate changes and that their lands will be supervised by a government agency.

Taxpayers who incorrectly determine or calculate their taxes can be reassessed or audited, bringing their affairs under close scrutiny. While ultimately it is the taxpayer's responsibility, donee organizations will want to assist donors in ensuring appropriate valuations and reporting of transactions. This will prevent any surprises of additional taxes for the taxpayer, and avoid resulting dissatisfaction with the donee organization and its conservation work.

In serious situations, the act provides for certain penalties. False or deceptive statements in a document, alteration or falsification of records, and willful evasion or attempt to evade payment of taxes, can result in fines of between 50 to 200 per cent of the tax sought to be evaded plus imprisonment for up to two (and, on indictment, five) years.²⁸ Where the nature of transactions (such as including over-inflated appraisals of donated property) ought to have alerted the taxpayer, this can be held to be evidence of gross negligence and absence of good faith, and thus merit the imposition of penalties of additional taxes.²⁹ In extraordinary situations of noncompliance with the act, charities could be deregistered and thus lose their tax-free and receipt-issuing privileges.¹ A 100 per cent tax penalty can be levied where a charity that is winding up does not dispose of its assets to a prescribed donee (generally, governments or other charities).

4.3 Property Tax Considerations

Property taxation is largely a provincial responsibility and is largely governed by the *Assessment Act*. With changes to property taxation in Ontario coming into effect in 1998, there are now new rules, procedures and a new agency (the Ontario Property Assessment Corporation). Fortunately, these changes provide several ways that annual property taxes can be reduced below ordinary rates. This is valuable knowledge for all landowners, both those with whom a land trust may be negotiating and also for the land trust itself. The property tax implications of certain types of owners and uses will affect the planning and structuring of securement transactions and thus are described in the following sections.

²⁸ *Income Tax Act*, subsections 239(1) and (2).

²⁹ *Arvisais v. M.N.R.* (1992), 93 D.T.C. 506 (T.C.C.). In this case, Mr. Arvisais and his family repeatedly purchased art works at 25 percent of their appraised and reported price, and then proceeded to donate them to art museums to obtain a charitable deduction. That he was a bank portfolio manager and thus informed and familiar with transactions, had sought advice only from his family rather than from independent sources, and had falsified the date of the reported purchase contributed to the court's finding of a lack of good faith and credibility.

The traditional property tax system based on an assessor's determination of highest and best use (i.e., its potential likely use) creates the economic incentive and sometimes the necessity to develop properties. Particularly as near-urban areas begin to experience increasing development, property values will rise as assessors recognize potential higher prices and the likelihood of zoning changes to accommodate such uses. A landowner's personal income and revenue from the land may not have changed, but extrinsic forces and reassessments of such properties at new market values will put financial pressure on these taxpayers and can affect their ability to hold property in conservation uses. For example, landowners may be forced to pursue revenue-generating activities (e.g., forestry or housing development), with their often negative consequences for biodiversity, in order to meet high property tax levels. Also, where lands do not qualify for a specified category of conservation or other open-space use, private lands will often be assessed taxes at much higher residential or development rates.

To counter this pressure, the Ontario government provides exemptions and reductions in taxes to particular kinds of landowners and for certain types of lands (e.g., farms, forests, or those with conservation value). Formerly, people owning certain conservation, managed forest and farmlands received partial or full rebates on their property taxes. Now, if the land qualifies, the landowner can fill out an application to be placed in these lower tax categories and thus will not need to wait to get a rebate back. These benefits reflect the fact that these open-space lands contribute valuable public amenities on private lands, require little if any public services, reduce costly sprawl, and would be converted from such uses if they were taxed at development rates.

4.3.1 Property Tax Assessment System

Generally, the province assesses real property for property tax purposes on the basis of its market value, or a percentage thereof. This approach to valuation of land recognizes its potential use and value rather than just its worth in its present use. This is so particularly in an area experiencing expanding development.

Once the province has assessed the land's value and determined into which assessment category it belongs (e.g., farmland, residential, or commercial), then a mill rate (a small fraction of a per cent) is calculated by all authorities that can levy property tax (generally, lower and upper-tier municipalities and school boards). The mill rate is set at a level that allows the taxing authority to meet its approved budget when applied to all types of assessment categories and the value of land within each category. A landowner will receive a tax assessment notice regarding the land's value and assessment class from the Ontario Property Assessment Corporation, and later a tax bill from the municipality which applies the applicable mill rates to the assessed value to determine the total annual property tax payable.

The assessed fair market value of property will reflect its "highest and best use," namely the most profitable, likely and legal use, assuming that a prospective purchaser is prepared to pay for the property's potential value. Use of this basis for comparing and assessing properties has the advantage of creating a uniform standard and thus equity

among taxpayers, although in practice this is not always followed and some legislation provides for preferential treatment in certain circumstances. The determination of fair market value follows the three methodologies outlined in the earlier appraisal section, although the use of a computer-based regression analysis of properties in an area, based on a number of factors, is now the standard practice. The Supreme Court of Canada has also endorsed standard practice by accepting a recent open sale of the property or recent open sales of identical properties in the same neighbourhood and market.

If a landowner disagrees with the assessment of a property, they can first informally discuss the matter with the regional assessment office; second, ask for an official reconsideration by that office; and third, if this is not satisfactory, appeal the assessment. During the transition period under the new property tax system, there is a substantial backlog in dealing with these appeals. If there is a default in paying property taxes, the municipality may sell the land to recapture these taxes, subject to elaborate procedures. Under the *Municipal Tax Sales Act*, the municipality has the choice of whether to have a tax sale or not.

4.3.2 Conservation Land Tax Incentive Program

Lands designated as “conservation lands” under the Conservation Land Tax Incentive Program (CLTIP) are now totally exempt from property tax and are also assessed at a value that roughly represents their “current use” (usually as farmland) rather than their fair market value. These lands are the most environmentally important in the province: Escarpment Natural Areas zoned as such in the Niagara Escarpment Plan, provincially significant wetlands (classes 1-3), provincially significant Areas of Natural and Scientific Interest (ANSI), the habitat of endangered species, and lands owned by nonprofit conservation groups which contribute to provincial conservation and natural heritage program objectives. The latter Other Conservation Lands category is particularly relevant for land trusts and is the only one not determined simply by the designation of provincially significant habitat by the provincial government. Note that a conservation easement on a property generally does not, in itself, create entitlement to this program.

The Ministry of Natural Resources identifies which lands qualify for each of the categories under CLTIP. Properties with eligible conservation land greater than 0.2 hectare (i.e., a half acre) in size are eligible for the program. This area does not include 0.4 hectare (one acre) assigned to any structure on site. For all but Other Conservation Lands, qualifying landowners will be notified by the Ministry of Municipal Affairs and will be provided with the appropriate forms to submit for the program. Each year, landowners must indicate some general information on the forms and agree to maintain the land under the terms of the program and allow MNR inspectors to enter onto the land to determine the land is being so maintained. The forms must be submitted by August 31 of each year.

Conservation organizations with new properties must obtain the appropriate forms and approvals in order to add them under the Other Conservation Lands program; the

Ministry of Municipal Affairs will only provide notification and forms for properties already in the program. MNR staff began a review of the Other Conservation Lands category in the spring of 1998 and proposed cancelling the category as one option. To date, while not formally taking a decision, the ministry has nonetheless changed this program by not accepting new properties. While it looks optimistic that the category will be reinstated in some form, this has not yet occurred due to limited staffing and other priorities. Consequently, only properties which qualified for the program in 1997 will continue to qualify, unless properties can qualify under one of the alternative conservation land categories or other programs. Land trusts may be able to apply for their other lands once the MNR makes a decision, but when and how this will be done and under what process for dealing with taxes already paid is not yet apparent.

4.3.3 Managed Forest Tax Incentive Program

Managed forests under the Managed Forest Tax Incentive Program are assessed at 25 per cent of residential rates and at a value reflecting local farm values. To qualify, the forested area of a property must cover at least four hectares (about ten acres) and be managed for one or more of conservation, recreation, forest product, or other accepted purposes. Generally, one acre will be subtracted from the eligible area for any building on the property, as will substantial clearings which are not part of the plan. Land must be owned by a Canadian citizen, a permanent resident, or a Canadian corporation, partnership or trust, or a conservation authority. Golf courses, campgrounds, ski hills and other such businesses may have their forests qualify if the plan contributes to the overall forest health, the commercial operation does not fragment the forest, and it does not intend to expand into the forest in the future. Land is not eligible if it is subject to a registered plan of subdivision, is licensed or zoned for aggregate extraction, or is owned by a municipal, provincial, or federal government that pays grants in lieu of taxes. Land with too small a density or size of tree may also not qualify, and thus determining the stocking of trees on a property is an important step in preparing the management plan.

Getting a management plan prepared and reviewed is a core part of the program. A detailed guide³⁰ provides substantial information on how landowners can prepare a plan, or else landowners can hire persons to prepare the plans on their behalf. The plan is then sent to a Managed Forest Plan Approver in the area (the MNR can provide a list of plan approvers), who reviews and approves the documentation for a fee and then forwards the package by August 31 to either the Ontario Woodlot Association or the Ontario Forestry Association. These organizations then forward the information to the provincial ministries. Landowners prepare a management plan every five years but must send in an Annual Renewal Card each year indicating any changes to the eligible area and other requested information. An audit must be done by a different Managed Forest Plan Approver at the end of that five year period, when the land is sold, or when the landowner leaves the program.

³⁰ Ministry of Natural Resources, *A Guide to ... The Managed Forest Tax Incentive Program (MFTIP)* (Peterborough, Ontario: Ministry of Natural Resources, 1998). Updated versions of this Guide are expected in subsequent years.

4.3.4 Farm Tax Incentive Program

Under the Farm Tax Incentive Program, qualifying farmlands will also be assessed at 25 per cent of residential rates and at farm values. The program does not require any management plan, and thus is preferred by some landowners over the MFTIP or even CLTIP programs.

To qualify, land must be classified as “farmland” by the regional assessment office and the owner or renter of the land must make at least \$7,000 from the farm and have a farm business registration number. Persons may also qualify if they earn less than \$7,000, under certain conditions. These conditions are, first, if they did earn this amount during the past ten years but have since retired or have fallen ill, or second, they can demonstrate a plan to eventually earn this amount under the “Start-A-Farm” program.

4.3.5 Other Tax Reduction Opportunities

Other lands may also qualify locally for lower or current use assessment, or for tax deferrals or rebates to charities. For example, some local municipalities have decided that a rebate of property taxes in some instances is appropriate. This allows more subtlety than the provincial programs by providing special recognition and relief for certain types of lands or ownership.

A few other categories of land receive enhanced property tax benefits under the *Assessment Act*. These include tax exemptions for lands used for particular educational, hospital, religious, cemetery, Boy Scouts and Girl Guides, agricultural society, battle site commemoration, and relief of the poor purposes. Some government agencies, such as the Ontario Heritage Foundation and Royal Botanical Gardens, are exempted from property taxation in their founding legislation. Understanding which organizations have these special situations may help tailor a transaction to determine who should retain or own a conservation property. Up to eight hectares (twenty acres) of land used for forestry purposes on a farm can also be exempt from property tax.

4.3.6 Property Taxation for Conservation Easements

When a conservation covenant or easement is placed on a lot, property values on-site and nearby may go up or down, depending upon the buyer and upon the particular local situation. Generally, it will restrict the types of uses allowed for a certain property, and this will usually alter the “highest and best use” that is legally possible on that property, often resulting in a lower property value. The extent of the reduction in value would correspond to the degree of restriction on uses of the property, the easement's terms, and the property's particular characteristics. Any reduction in the property's value may provide grounds for a landowner's request for reassessment or an appeal according to the property's new market value. However, the result of this approach is unclear, given the uncertain language used in the legislation, as described below.

The terms used in the *Assessment Act* for similar interests contemplate only common law easements and equitable covenants, i.e., those requiring appurtenant (nearby) lands:

Where an easement is appurtenant to any land, it shall be assessed in connection with and as part of the land at the added value it gives to the land as the dominant tenement, and the assessment of the land that, as the servient tenement, is subject to the easement shall be reduced accordingly.³¹

Regarding a related aspect, if a landowner defaults in paying property taxes, a municipality usually may sell the land to recapture these taxes, subject to elaborate procedures. The *Municipal Tax Sales Act* provides that land sold for arrears in taxes will not affect easements or covenants attached to the land.³² However, this is again phrased within the language of common law easements and equitable covenants and their associated requirements to have nearby land.

The authorizing legislation for most conservation easements in Ontario deems these interests to be restrictive covenants.³³ Therefore statutory interpretation may bring such conservation easements within the scope of the assessment and tax sales provisions. While this may benefit easement use and landowners generally, it does not assist assessors with the mechanics, since there is no property to which to assign and assess the value of the easement.

There is little case law on the interpretation of these easement assessment provisions, and most cases do not directly consider the issues of concern here. While the cases are limited and at times quite old, such treatment by these tribunals demonstrates a reluctance to apply the law in a manner that reduces assessment for lands subject to easements. In practice, some properties with development restrictions have, upon appeal, received a generic 50 per cent reduction in assessment. Further, a landowner can provide particulars and obtain a letter from a municipality indicating there are limitations on development for the parcel, which can then be provided to the regional assessment office for consideration.

With untested statutory interpretation required, little guidance otherwise from the case law, and only administrative practice to rely upon, the property taxation of conservation easements remains somewhat uncertain. Consequently, most conservation easement documents will require the landowner to continue to pay all property or other taxes for the land. However, where there are opportunities to reduce the property taxes on the

³¹ *Assessment Act*, R.S.O. 1990, c.A.31, s.9(1). A restrictive covenant running with the land is also deemed to be an easement within the meaning of this section; see subsection 9(2).

³² For example, the *Municipal Tax Sales Act*, R.S.O. 1990, c.M.60, s.9(5).

³³ *Conservation Land Act*, R.S.O. 1990, c.C.28, s.3(10).

property once a conservation easement is in place, the land trust may wish to help the landowner obtain these benefits.

Properties with a conservation covenant or easement may qualify for preferential assessment or tax reduction under the incentive programs noted earlier, especially if they meet the program's criteria independently of the easement. The Ontario government's position on whether conservation covenants or easements would qualify for CLTIP has yet to be established, although they did qualify under the predecessor program. Nonetheless, the tax reduction programs are generally based on outright ownership, not on partial interests, and may not encompass such arrangements in the future.

The impact of conservation covenants and easements on property taxation is uncertain for both individual and neighbouring properties and depends upon numerous factors. Restricting the uses on the property may cause one buyer to pay a lower price, while another buyer may feel that the protection of the attributes on the property itself or nearby is in fact an asset and may be willing to pay market rates or a slight premium for the property. If a series of easements protect the scenic, environmental, or recreational aspects of a community, then this may increase the value of all the lots in that area. The zoning of the land will also affect property values; if a conservation easement merely duplicates existing zoning provisions or still allows some development, the impact on property and assessment values will likely be negligible. Further, open-space uses have been shown to require less public servicing. Protecting such uses through a conservation easement thus may help reduce a municipality's overall tax expenditures. These issues are further discussed in the next section.

4.3.7 Economic Benefits From Tax Reductions

Lands that qualify in these conservation, managed forest, and farm land categories contribute to the health and rural character of communities. However, the impact of conservation on property taxation and municipal finance is understandably a concern of increasingly stretched municipal governments and taxpayers for two reasons: in the short term, land protection may result in land value being removed from the tax rolls and the taxes then are shifted to other taxpayers; and in the long term, protected land cannot be developed into something which would pay more taxes than open space; for example, a commercial business, which would help reduce other taxpayers' bills.³⁴ Land trusts and landowners participating in these tax reduction programs may become involved in discussions about these concerns and thus some background and perspectives are provided here.

The value of the land will relate to patterns of buyer preference, the value of protecting existing amenities, and the availability of similar amenities nearby. In reality, protecting

³⁴ Deb Brighton and Judy Cooper, *The Effect of Land Conservation on Property Tax Bills in Six Vermont Towns* (Montpellier VT: Vermont Land Trust, 1994), at p.1.

a few parcels of land will likely redirect rather than preclude development, thereby influencing its pattern and location rather than its amount or type.³⁵

Conserving land produces various environmental, aesthetic, and recreational benefits which are regularly used to market properties and are well known to raise property values and assessment.³⁶ As ex-urbanites take an interest in certain areas, many will value the long-term security of preserved amenities, privacy, views, access to trails and hunting, and reduced possibilities of development and disturbance next door. Maintaining open space allows farmers to continue farming; doing so may decrease nearby subdivision and development that affects viable farm size, a rural economy, and complaints about traditional farm practices by newcomers. Farmers and other resource producers also may be able to use conservation securement to gain industry certification and resulting premium market access and prices.

Besides possible contribution to higher assessment values and thus revenues for municipalities, conservation can also help reduce municipal costs. Securement of lands can restrict and avoid development pressures and demands, thus reducing tendencies toward urban sprawl and associated infrastructure and servicing costs. In many cases this must accompany increased densities within existing urban areas, made more palatable and attractive by planning for accessible green space nearby.

In Ontario, the 1996 *Report of the Greater Toronto Area Task Force* made the case that \$1 billion each year could be saved in this region if development was made more compact.³⁷ Several U.S. studies have demonstrated that controlling diffuse development with its expensive infrastructure and servicing costs is actually more cost effective for a municipality and its taxpayers than is unbridled development.³⁸ The use of conservation techniques is now being funded by numerous state and local governments in the U.S. in order to protect important community assets and avoid the consequences of urban sprawl. As one example, in 1998 New Jersey authorized the spending of \$98 million each year for thirty years for this purpose.

In general, tax bills are higher—not lower—in towns with more people and in towns with more commercial/industrial development. It may be just as accurate to look at land

35 Brighton and Cooper, note 29 above, at p.21.

36 For example, U.S. National Park Service, *Economic Impacts of Protecting Rivers, Trails, and Greenway Corridors: a Resource Book*, 4th Ed., (Washington, DC: National Park Service, Rivers, Trails and Conservation Assistance, 1995); Land Trust Alliance, *Economic Benefits of Land Protection* (Washington, DC: Land Trust Alliance, 1994); Steve Lerner and William Poole, *The Economic Benefits of Parks and Open Space* (San Francisco, CA, Trust for Public Lands, 1999).

37 Greater Toronto Area Task Force, *Greater Toronto* (1996, Publications Ontario, Toronto), at p.112; also see Pamela Blais, “The Economics of Urban Form”, prepared as a background paper to the *Greater Toronto* report and appended to it on disk.

38 See, for example, the various Costs of Community Studies conducted by the American Farmland Trust of Washington, DC.

conservation as protecting the town from development, which is expensive to service, as it is to look at conservation as precluding development, which would bring in tax revenues.³⁹

In summary, protected or nearby lands may increase in value, they will remain as open space to provide amenities for the community, and they will help avoid costly public servicing. Property tax implications for municipal treasuries are likely to be small. As a result,

The conclusion of the report is not that towns should discourage growth and development. Rather, townspeople should make decisions about where development and conservation take place based on their goals and vision for the future of their communities—not on perceptions of property tax impacts.⁴⁰

4.4 Other Tax Considerations

4.4.1 Goods and Services Tax

On January 1, 1991, the Goods and Services Tax (GST) replaced the Federal Sales Tax. The GST applies, at a rate of 7 per cent, to the supply of the vast majority of goods and services consumed in Canada. It is thus relevant to properties owned by land trusts and those they might acquire.

Certain goods and services are designated as zero-rated or exempt, including:

- long-term residential rents and sales of used housing;
- most supplies by charities;
- certain supplies by nonprofit organizations, etc.

Conservation authorities, as key partners for land trusts, need to provide a declaration that they perform municipal functions in order to be exempt from the tax.

Charities may claim a rebate of 50 per cent of GST payable. Where payable, the GST is therefore calculated at 3.5 per cent (i.e., 50 per cent of 7 per cent). Certain goods and services that charities provide are also exempt from GST, including:

- licences or short-term leases of real property (e.g., hall, basement, or office rentals) and property or services provided in conjunction with these licences or leases (e.g., audio-visual equipment);
- parking spaces;
- property or services that a caterer provides under contract for an event or occasion;

³⁹ Brighton and Cooper, at p.21.

⁴⁰ Brighton and Cooper, at pp.9 and 21 (emphasis in the original).

- admissions to fundraising events such as dinners, balls, and concerts when part of the payment represents an amount for which the charity can issue an official donation receipt for income tax purposes;
- and rights entitling children under 15 to supervision or instruction in recreational or athletic activities.

With respect to the purchase of land by a land trust, the following types of property are exempt:

- (a) A long-term residential rent;
- (b) The sale of used residential housing that has not been substantially renovated;
- (c) The sale of personal-use land by an individual or trust;
- (d) The sale of farmland to a related individual who will be utilizing the lands and premises for personal use;
- (e) The sale of real property by a charity, nonprofit organization, or other public service organization.

Exemption (c) is most often the situation with respect to a land trust's purchases. One needs to have information on the type of owner and land use, read the definitions and review the exemptions, determine who has responsibility for collecting and reporting tax as well as the documentation needed to support the transaction.

Note that donations of land or conservation easements are not subject to GST since there is no payment or consideration. Purchases of commercial, corporate, or holding company lands are subject to GST, calculated at 3.5 per cent of the purchase price.

Prior to completion of any purchase, the land trust should require that a GST Certificate be prepared and signed by the vendor. The general form of the Certificate is found in Appendix 4F.

4.4.2 Land Transfer Tax

Where land is sold or otherwise transferred, it is subject to a tax under the *Land Transfer Tax Act* based upon the declared value of the transaction. Where there is a donation of property, there is no payment to the seller and thus no land transfer tax is due. Governments are not required to pay this tax.

Land transfer tax will be payable on purchases of land by the land trust. The amount of tax payable is calculated as follows:

First \$55,000 of purchase price	0.5%
Next \$195,000 of purchase price	1.0%
Next \$150,000 of purchase price	1.5%

contributions." The contributions, however, would be applied against the individual's Canadian source income. In other words, if the U.S. resident does not have an income in Canada, there is no benefit derived from the charitable gift.

For those U.S. residents who do not have a Canadian source income, the alternative is for them to donate the Canadian real property to a U.S. charitable organization with the intent that title then will be transferred to a Canadian land trust. This is a significant motivator for nonresidents to donate their Canadian real property. By donating the property to a U.S. organization, it is ensured that their gift can be applied as a deduction against their U.S. income tax. However, there are complex taxation matters associated with this type of transaction, which will be discussed further in this section. Thus the donor is encouraged to seek independent advice prior to considering the donation, so that they are aware of the implications.

The process for accepting a donation of Canadian real property from a Canadian nonresident does not differ that much, in the initial stages, from a Canadian resident donation, except that the donation must be made to a U.S. charitable organization. In general, the process for a fee simple donation by a nonresident is made through the cooperation of The Nature Conservancy (TNC) in the U.S. This assumes that TNC is prepared to assist in this capacity, which is usually the case if the land has some demonstrated environmental importance and this can be documented to TNC. The process involves the following:

- the nonresident provides a letter of intent to donate to TNC;
- the land trust confirms that the property meets its criteria, and then provides a natural features summary report to TNC;
- a preliminary title search is conducted, with the land trust providing a copy of the search report to TNC;
- an environmental assessment is conducted, with the land trust providing a copy of the assessment report to TNC;
- if required, a survey is completed by the donor;
- a market value appraisal is then conducted by the donor (within sixty days of transfer);
- a Transfer/Deed of Land is prepared for the donor to transfer the property to TNC; and
- TNC later transfers the property to the land trust, sometimes restricting the land's future use to conservation purposes in order to meet its U.S. federal tax and charity responsibilities.

No later than ten days after the date of the disposition, the donor must provide Revenue Canada with form number T2062, *Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property* (see Appendix 4G).

To avoid or limit capital gains for a donation of property, the *Income Tax Act* under Section 118.1(6) allows for the donor to designate a value of the property at disposition

other than the actual fair market value. A nonresident may also designate the value of the gifted property, provided that the gift was made to a "prescribed donee" (currently the only prescribed donee is The Nature Conservancy). TNC provides an undertaking to the Minister of National Revenue to the effect that the property will be held for use in the public interest (see Appendix H). The nonresident must file a Canadian income tax return for the year in which the disposition was made. If the donor is able to designate the lower value of the gifted property, they are able to avoid the capital gain, yet the full market value of the gift may still be claimed for U.S. tax deduction purposes.

4.5.2 Limitations on Carrying Out Certain Transactions

Besides income tax, there are other considerations in cross-border transactions, both for the donor and the land trust. These include:

- Are there state, provincial or internal organizational rules against holding land outside of the national or sub-national jurisdiction? For example, the Maine Coast Heritage Trust's by-laws restrict it to acquiring lands within the State of Maine. As well, certain agencies and their authorizing legislation may only enable acquisition of land within the jurisdiction or a defined area or mandate.
- Is the donor a corporation with a corporate relationship in the other country, which would allow particular opportunities to structure tax and ownership arrangements? The complexities of international corporate structures cannot be addressed here, except to note that different structures and relationships will result in varying tax consequences and flexibility.
- Who will have local supervision and management responsibilities during the period when The Nature Conservancy has ownership (sometimes two or more years)?

These and other factors will be important to consider when planning a transaction involving nonresidents.

4.6 **Additional Reading and References**

"Advanced Appraisal Issues" (Topic 6j), in: *National Rally '96 Workbook*, James L. Catterton, Land Trust Alliance, Washington DC, 1996.

"Canada and the U.S.: Cross-Border Donations and Taxes" (Topic IO), in: *National Land Trust Rally '96 Workbook*, Ian Attridge, Land Trust Alliance, Washington DC, 1996.

Conservation Easement Valuation and Taxation in Canada, Ian Attridge, North American Wetlands Conservation Council - Canada, Ottawa, 1997.

Deductible Gifts and Official Donation Receipts, Revenue Canada, Interpretation Bulletin IT-110R2, 1989.

Ecological Gifts: Implementing Provisions of the Income Tax Act of Canada, Canadian Wildlife Service, Ottawa, 1998.

Economic Benefits of Land Protection, Land Trust Alliance, Washington DC, 1994.

The Economic Benefits of Parks and Open Space, Steve Lerner and William Poole, Trust for Public Lands, San Francisco CA, 1999.

Economic Impacts of Protecting Rivers, Trails, and Greenway Corridors: a Resource Book, 4th Ed., U.S. National Park Service - Rivers, Trails and Conservation Assistance, Washington DC, 1995.

Gifts in Kind to Charity and Others, Revenue Canada, Interpretation Bulletin IT-297R2, 1990.

A Guide to ... The Managed Forest Tax Incentive Program (MFTIP), Ontario Ministry of Natural Resources, Peterborough, Ontario, 1998.

You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands, Mark Denhez, North American Wetlands Conservation Council - Canada, Ottawa, 1992.

4.7 List of Appendices

- 4A Purchase or Fee Simple Donation - Request for Appraisal Services
- 4B Conservation Easement - Request for Appraisal Services
- 4C Ecological Gifts (Ontario) Criteria
- 4D Ecological Gifts Form and Information Guidance
- 4E Ecological Gifts (Ontario) Process
- 4F GST Certificate
- 4G Revenue Canada Form T2062, *Non-Resident Compliance With Canadian Property Disposition*
- 4H Form of Undertaking for Prescribed Donee

Appendix 4A

PURCHASE OR FEE SIMPLE DONATION – REQUEST FOR APPRAISAL SERVICES

Request for Appraisal Services

Per our recent conversation, the [name of land trust] wishes to establish the current fair market value to assist in deliberations concerning an offer to purchase (donate) a property. The property is located in _ and is described as _. The property comprises approximately _ acres and is vacant land.

The appraisal required at this time is a report as to the market value of the subject property in its highest and best use. The market value definition as utilized in the report will be the Appraisal Institute of Canada's standard definition which includes stipulations with respect to a normal market exposure period and the lack of any unusual or special conditions. Based on past appraisals the land trust has commissioned, it may be most appropriate to prepare a Limited Scope, Summary Report. The limitations would be that:

1. You will not carry out a detailed title search which could possibly reveal encroachments, easements, or other factors which could affect value;
2. The report will rely on information as reported by listing and selling agents, our appraisal colleagues, and as set out in MLS records and not all comparable sales data will be personally confirmed.

The appraisal report will be prepared by an Accredited Appraiser Canadian Institute designated member of the Appraisal Institute of Canada. Upon review of the enclosed material, we invite you to submit a Proposal for Real Estate Appraisal Consulting Services on the form provided before [set deadline]. Upon review of the proposals received, the land trust will select an appraiser, with the appraisal being completed by _. Please advise of any cost difference in preparing the report within a 20, 30 or 45-day time frame.

If you would like to discuss this matter or require additional information, please contact me.

Thank you for your consideration.

Yours sincerely,

Enclose the following form:

THE [NAME OF LAND TRUST]

Proposal for Real Estate Appraisal Consulting Services

TO: PROPERTY COMMITTEE, [NAME OF LAND TRUST]

I, _ of the firm of _, hereby offer my/our services to carry out an appraisal of market value of the property of _ known as _ [registered plan] and consisting of _ acres more or less for the [name of land trust].

In the event that my/our proposal is accepted, the following terms and conditions will apply in the resulting contract:

1. The appraisal will be an estimate of the market value of the fee simple interest in the property, as of [date], on the basis that the property was being offered for sale on that date or those dates, or on the basis of the special terms of reference for this assignment as specified in Schedule A hereto.
2. Four (4) copies of a written appraisal report will be delivered to [the name of land trust] within _ () days of the receipt of your authorization to carry out the work.
3. Our fee for undertaking the work will be \$ _ per day plus out-of-pocket expenses. It is estimated that the work will take _ () days to complete. It is agreed that the total ceiling price will not exceed \$ _ including out-of-pocket expenses and the Goods and Services Tax.
4. My/our account for services rendered will be submitted to you in duplicate with the completed appraisal reports and will contain full details of the days worked, charges per day and out-of-pocket expenses.
5. It is understood that payment of my/our account will be made within thirty (30) days of delivery of the completed report.
6. If I/we require more time than originally estimated to carry out the work, I/we shall notify you immediately and request your approval to extend the time for the delivery of the final report.
7. If required, the appraiser in charge of the work will appear as a witness for the [name of land trust] at any arbitration or hearing related to the subject property. My/our fee for court appearance is \$ _ per day.
8. All work under this contract shall be done by or under the direct supervision of _ whose qualifications are as follows:
.....
9. The appraiser warrants that neither he/she nor his/her firm have a present, past or future contemplated interest in the ownership of the property which is the subject of this contract.
10. All working papers shall remain in the property of the appraiser or firm which performs the work, but copies shall be made available to the [name of land trust] upon request.

11. This proposal constitutes an offer to perform the work in accordance with the recognized professional standards of the Appraisal Institute of Canada and may be accepted, subject to prior written notice of revocation, within fifteen (15) days of the date it is received by the [name of land trust].
12. It is agreed that during the course of the work, I/we shall not undertake any work for another client that could reasonably result in a conflict of interest without obtaining the prior written consent of the [name of land trust].
13. I/we agree upon request to update the appraisal report within _ months of the completion of the original report, at a cost not to exceed \$_ including disbursements.
14. The appraiser shall keep detailed records of the hours worked and fees charged under this agreement including the hours and fees pertaining to any subconsultant. Such records shall be kept for four (4) years following completion of this assignment and upon request, shall be made available to the [name of land trust].
15. The appraiser shall at all time indemnify and save harmless the [name of land trust], its officers, employees and agents from and against all actions, damages, claims, demands and losses, including legal expenses incurred as a result of any claim, demand or action by whomever made, brought or instituted, arising out of or in any way related to this contract by the negligence of an officer, employee or agent of the appraiser.
16. The [name of land trust] may terminate this contract at any time upon giving twenty-four (24) hours written notice in which case the appraiser shall be paid a reasonable amount for the work completed to the satisfaction of the [name of land trust] to the date of termination, such amount not to exceed the agreed-upon ceiling price.
17. The appraiser agrees that this contract will not be assigned or let to a subconsultant without the prior consent of the [name of land trust].
18. The appraiser, his/her servants or agents shall treat as confidential and shall safeguard all knowledge or information acquired by it or its officers, employees, or agents or subconsultants during the course of performing this assignment.
19. Acceptance shall be made by regular mail and/or facsimile transmission addressed to me/us at the address set out below.

Schedule A

- (a) The report will be prepared by a member in good standing of the Appraisal Institute of Canada.
- (b) The report will be acceptable to the [name of land trust] (and the landowner related to meeting the requirements of Revenue Canada for substantiating the value of a receipt for income tax purposes.)
- (c) Four (4) certified copies of the report will be provided to the [name of land trust].
- (d) The appraisal value is to be shown on both a total value and a price per acre basis.
- (e) The cost estimated to complete the appraisal report is to show a breakdown between professional fee, disbursements, and the Goods and Services Tax.
- (f) The deadline for completion of the appraisal is __.
- (g) The appraisal is to be in a Limited Scope, Summary Report format and completed consistent with the Code of Ethics and Rules of Professional Conduct and the Standards of Professional Practice of the Appraisal Institute of Canada.
- (h) The appropriate geographic area should be considered for comparable sales. Full details on all comparables and the rationale for any adjustments are to be included in the report.
- (i) For the purposes of appraisal, it may be assumed that there are no First Nation Aboriginal People claims to the property.
- (j) Your report must address the possibility of the presence of any hazardous waste that may be or may have been stored on or in the immediate vicinity of the subject property.
- (k) This matter is to be treated in confidence between the [name of land trust] and your company.

Appendix 4B

CONSERVATION EASEMENT – REQUEST FOR APPRAISAL SERVICES

Request for Appraisal Services

The [name of land trust] wishes to establish the current fair market value in support of an offer to donate a conservation easement. A conservation easement places covenants on title which restricts the future use and development of land. The agreement runs with the land and binds future owners.

The property is located __, (see attached map) more particularly described as __. The property comprises approximately __ acres and is [vacant/contains residence] land. The attached summary of restrictions are the subject of the valuation.

The appraisal required at this time is a report as to the market value of the subject property in its current highest and best use and a report as to the market value of the subject property in its "after" highest and best use. Under the *Income Tax Act (Canada)* this "before and after" method of valuation is required to determine the market value of such agreements. The market value definition as utilized in the report will be the Appraisal Institute of Canada's standard definition which includes stipulations with respect to a normal market exposure period and the lack of any unusual or special conditions. Based on past appraisals the [name of land trust] has commissioned, it may be most appropriate to prepare a Limited Scope, Summary Report. The limitations would be that:

1. You will not carry out a detailed title search which could possibly reveal encroachments, easements, or other factors which could affect value
2. The report will rely on information as reported by listing and selling agents, our appraisal colleagues, and as set out in MLS records and not all comparable sales data will be personally confirmed.

The appraisal report will be prepared by an Accredited Appraiser Canadian Institute designated member of the Appraisal Institute of Canada. Upon review of the enclosed material, we invite you to submit a Proposal for Real Estate Appraisal Consulting Services on the form provided before [set deadline]. Upon review of the proposals received, the [name of land trust] will select an appraiser, with the appraisal being completed by __. Please advise of any cost difference in preparing the report within a 20, 30 or 45-day time frame.

If you would like to discuss this matter or require additional information, please contact me.

Thank you for your consideration.

Yours sincerely,

Enclose the following form:

THE [NAME OF LAND TRUST]

Proposal for Real Estate Appraisal Consulting Services

TO: PROPERTY COMMITTEE, [NAME OF LAND TRUST]

I, _ of the firm _, hereby offer my services to carry out an appraisal of market value of the property of Mr(s). _, more particularly described as _, comprising _ acres more or less, for the [name of land trust].

In the event that our proposal is accepted, the following terms and conditions will apply in the resulting contract:

1. The appraisal will be an estimate of the devaluation of the fair market valuation of the fee simple interest in the property, as of [date], based on the effect of the restrictions on future use and development of the property, or injurious affection thereto, as provided under the proposed restrictions (attached), and on the basis of the special terms of reference for this assignment as specified in Schedule A hereto.
2. Four (4) copies of a written appraisal report will be delivered to the [name of land trust] within _() days of the receipt of your authorization to carry out the work.
3. Our fee for undertaking the work will be \$ _ per day plus out-of-pocket expenses. It is estimated that the work will take _ days to complete. It is agreed that the total ceiling price will not exceed \$ _ including out-of-pocket expenses and the Goods and Services Tax.
4. Our account for services rendered will be submitted to you in duplicate with the completed appraisal reports and will contain full details of the days worked, charges per day and out-of-pocket expenses.
5. It is understood that payment of our account will be made within thirty (30) days of delivery of the completed report.
6. If we require more time than originally estimated to carry out the work, we shall notify you immediately and request your approval to extend the time for the delivery of the final report.
7. If required, the appraiser in charge of the work will appear as a witness for the [name of land trust] at any arbitration or hearing related to the subject property. Our fee for court appearance is \$ _ per day.
8. For the purpose of our report, the definition of market value of a conservation easement agreement shall be:

"the fair market value of an easement to which land is subject is deemed to be the greater of its fair market value otherwise determined and the amount by which the fair market value of the land is reduced as a result of the making of the gift."

9. All work under this contract shall be done by or under the direct supervision of _ whose qualifications are as follows: _____
_____.
10. The appraiser warrants that neither he/she nor his/her firm have a present, past, or future contemplated interest in the ownership of the property which is the subject of this contract.
11. All working papers shall remain in the property of the appraiser or firm which performs the work, but copies shall be made available to the [name of land trust] upon request.
12. This proposal constitutes an offer to perform the work in accordance with the recognized professional standards of the Appraisal Institute of Canada and may be accepted, subject to prior written notice of revocation, within fifteen (15) days of the date it is received by the [name of land trust].
13. It is agreed that during the course of the work, we shall not undertake any work for another client that could reasonably result in a conflict of interest without obtaining the prior written consent of the [name of land trust].
14. We agree upon request to update the appraisal report within _ months of the completion of the original report, at a cost not to exceed \$_ including disbursements.
15. The appraiser shall keep detailed records of the hours worked and fees charged under this agreement, including the hours and fees pertaining to any sub-consultant. Such records shall be kept for four (4) years following completion of this assignment and upon request, shall be made available to the [name of land trust].
16. The appraiser shall at all time indemnify and save harmless the [name of land trust], its officers, employees, and agents from and against all actions, damages, claims, demands, and losses, including legal expenses incurred as a result of any claim, demand, or action by whomever made, brought or instituted, arising out of or in any way related to this contract by the negligence of an officer, employee or agent of the appraiser.
17. The [name of land trust] may terminate this contract at any time upon giving twenty-four (24) hours written notice in which case the appraiser shall be paid a reasonable amount for the work completed to the satisfaction of the [name of land trust] to the date of termination, such amount not to exceed the agreed -upon ceiling price.
18. The appraiser agrees that this contract will not be assigned or let to a subconsultant without the prior consent of the [name of land trust].
19. The appraiser, his servants or agents shall treat as confidential and shall safeguard all knowledge or information acquired by it or its officers, employees, or agents or subconsultants during the course of performing this assignment.
20. Acceptance shall be made by regular mail and/or facsimile transmission addressed to us at the address set out below.

Schedule A

- (a) The report will be prepared by a member in good standing of the Appraisal Institute of Canada.
- (b) The report will be acceptable to the [name of land trust] and the landowner related to meeting the requirements of Revenue Canada for substantiating the value of a receipt for income tax purposes.
- (c) Four (4) certified copies of the report will be provided to the [name of land trust].
- (d) The appraisal value is to be shown as both a before and after value and include the total value of the Conservation Agreement interest and a price per acre basis.
- (e) The cost estimated to complete the appraisal report is to show a breakdown between professional fee, disbursements, and the Goods and Services Tax.
- (f) The deadline for completion of the appraisal is [date].
- (g) The appraisal is to be in a comprehensive format and completed consistent with the Code of Ethics and Rules of Professional Conduct and the Standards of Professional Practice of the Appraisal Institute of Canada.
- (h) The appropriate geographic area should be considered for comparable sales. Full details on all comparables and the rationale for any adjustments are to be included in the report.
- (i) For the purposes of appraisal, it may be assumed that there are no First Nation Aboriginal People claims to the property.
- (j) Your report must address the possibility of the presence of any hazardous waste that may be or may have been stored on or in the immediate vicinity of the subject property.
- (k) This matter is to be treated in confidence between the [name of land trust] and your company.

Appendix 4C

ECOLOGICAL GIFTS (ONTARIO) CRITERIA

ONTARIO

The following information is provided to assist in the identification of ecologically sensitive lands for the purposes of the *Income Tax Act (Canada)* and donation of ecological gifts to qualified registered charities and municipalities in Ontario. This is effective April 1, 1996.

Ecologically sensitive lands are generally defined as areas or sites that presently, or in the future, could significantly contribute to the conservation of Canada's biodiversity and natural environmental heritage.

The listing below is divided into two parts:

A. Specific Categories of lands that are deemed to be directly qualified as ecologically sensitive in specific locations in Ontario.

B. General Criteria for other lands that may qualify as ecologically sensitive across Ontario.

A. Specific Categories of Qualified Lands

Lands, easements, or covenants relative to such lands, which fall into one or more of the following categories, shall be deemed to be ecologically sensitive lands in Ontario:

A1. Significant portions of the habitat of species determined to be endangered, threatened or vulnerable in Ontario, as specified in a recovery plan or other biological study;

A2. Areas designated as Provincially Significant Wetlands;

A3. Provincial or regional Areas of Natural and Scientific Interest;

A4. Designated Areas of Concern for biodiversity purposes as identified in Forest Management Plans;

A5. Areas qualifying for the Conservation Land Tax Reduction Program;

A6. Areas managed for wildlife habitat conservation purposes that qualify under the Managed Forest Tax Reduction Program;

A7. Areas promoting the conservation of natural heritage and biodiversity that are identified within a regional or watershed plan or strategy developed by a recognized conservation organization;

A8. Areas designated as a World Heritage Site for biodiversity conservation purposes, a core area of a UNESCO Biosphere Reserve, or a Wetland of International Importance under the Ramsar Convention;

A9. Areas of biodiversity significance identified in a Canadian Heritage Rivers Management Plan or Strategy;

A10. Areas designated in the Niagara Escarpment Plan as an Escarpment Protection Area or an Escarpment Natural Area;

A11. Areas designated as Natural Core, Natural Corridor, Sensitive Hydrological Feature, Regional Recharge, Regional Discharge, or Significant Landform within the Oak Ridges Moraine Strategy or Guidelines;

A12. Areas designated Core Area, Corridor, or Restoration Area in the Lake Ontario Greenway Strategy;

A13. Areas designated for biodiversity conservation purposes within Management Plans or Strategies for the Trent-Severn or Rideau Waterways;

A14. Areas within a municipal Official Plan or zoning by-law under the Planning Act (Ontario) designated as an Environmentally Sensitive Area, Environmentally Significant Area, Environmental Protection Area, Restoration Area, Natural Heritage System, or other designation for similar purposes that is compatible with the conservation of the biodiversity, ecological features, and functions of the site;

A15. Areas within or adjacent to a Provincial Park, Provincial Park Reserve, Conservation Reserve, Conservation Area, Wilderness Area, Provincial Wildlife Area, National Wildlife Area, Migratory Bird Sanctuary, National Park, National Park Reserve, or Ecological or Nature Reserve managed by a government or nongovernment agency;

A16. Municipal parks or other protected areas designated or managed for biodiversity conservation purposes;

A17. Areas identified as Carolinian Canada sites or alternate sites;

A18. Areas designated as Core Natural Area, Natural Area Buffer, Natural Area Link, or Valued Ecosystem Component in the National Capital Greenbelt Master Plan by the National Capital Commission; and

A19. Areas designated for biodiversity purposes by regional agencies such as the Niagara Parks Commission, St. Clair Parkway Commission, St. Lawrence Parks Commission, and the Waterfront Regeneration Trust.

B. General Criteria for Other Ecologically Sensitive Lands

Lands, easements, or covenants relative to such lands, which meet one or more of the following general criteria, may also be considered to be ecologically sensitive lands in Ontario—subject to the approval of the federal Minister of the Environment or a person delegated by the Minister for this purpose. The term "significant" for the purposes below refers to definitions provided in Provincial Policy Statements.

B1. Significant habitats such as alvars, prairies, cliffs, Great Lakes coastal habitats, old growth forest areas, glacial relic communities, and sites with enduring geological features that contribute to biodiversity;

B2. Areas of wildlife concentration such as bat caves, snake hibernacula, heronries, deer wintering yards, and sites used by migratory water birds and other species for seasonal staging, feeding, breeding, and like purposes;

B3. Areas identified, designated or protected as ecologically significant or ecologically important by a government or nongovernment local, provincial, national, or international system or body;

B4. Significant water bodies, rivers, streams, shorelines, valleys, wetlands, groundwater recharge areas, headwaters and aquifers;

B5. Significant wildlife or fish habitats;

B6. Significant woodlands;

B7. Areas that have significant current or potential for enhanced ecological values through restoration, remediation, management or geographic proximity to other ecologically significant properties;

B8. Natural buffers and adjacent lands around areas identified under other ecologically sensitive lands categories or criteria that contribute to the conservation of biodiversity;

B9. Natural links or corridors between areas identified under other ecologically sensitive land categories or criteria that contribute to the conservation of biodiversity;

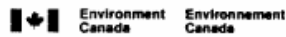
B10. Areas used for long-term scientific study or baseline and benchmark monitoring of biodiversity; and

B11. Areas that contribute to Canada's environmental heritage through the maintenance of the genetic diversity of species, ecosystem health, or landscape biodiversity, and other natural spaces of significance to the environment in which they are located.

The categories and criteria listed above, for the purposes of implementation of provisions in the *Income Tax Act (Canada)* for ecological gifts, have been agreed to by representatives of the governments of Ontario and Canada. This list and criteria may be further elaborated and amended by agreement between Environment Canada and the Ontario Ministry of Natural Resources.

[the names of qualified organizations in Ontario may be added]

Appendix 4D



Certificate for Donation of Ecologically Sensitive Land *(with respect to the Income Tax Act of Canada)*

Please print clearly

This form must be completed by a representative of a provincial ministry or other agency delegated by the Minister of the Environment to attest that:

- the land or covenant, easement or servitude that is the object of this gift to a Canadian municipality or registered charity is ecologically sensitive, and
- if the recipient of this gift is a registered charity in Canada, at the time of the gift, it has as a principal objective the conservation of Canada's environmental heritage.

This certificate permits the donor to receive a deduction in taxable income (if a corporation) or a non-refundable tax credit (if an individual). A tax receipt should accompany this certificate when submitting your annual income tax return to Revenue Canada.

Identification of Donor

Name	S.I.N. (if an individual)
Address	

Certification of Ecological Sensitivity of Donation

Type of Donation: <input type="checkbox"/> Land <input type="checkbox"/> Covenant <input type="checkbox"/> Easement <input type="checkbox"/> Servitude	Area (hectares or acres, if applicable) _____
Location and Legal Description of the Donated Land	
The Minister of the Environment attests that, with respect to this gift, the above described land which is the object of this donation is ecologically sensitive and of significant value to Canada's environmental heritage.	
Name and Position of Minister or Delegated Authority	
Signature	Date

Identification of Recipient

Name of Organization or Municipality
Address
Charitable Tax Number (if not a municipality)

Certification of Qualification of a Recipient Registered Charity

The Minister of the Environment attests that, with respect to this gift, the above named organization is a charity registered in Canada and, at the time of this donation of ecologically sensitive land, has as a principal objective the conservation of Canada's environmental heritage.	
Name and Position of Minister or Delegated Authority	
Signature	Date

1 - COPY TO ATTACH TO INCOME TAX RETURN (send to Revenue Canada)

CANADIAN WILDLIFE SERVICE GUIDANCE FOR INFORMATION REQUIRED TO SUPPORT CERTIFICATION OF ECOLOGICAL GIFTS

(A) Name and Address of Donor and SIN number.

Applies to any Canadian corporation or private individual. Record full name and postal address. The SIN number is required by Revenue Canada as the DOE Certificate becomes a protected document under the *Income Tax Act* when submitted. If the donor does not want to provide their number to the charity, they may provide it directly to Deb Lauder at (416) 739-5843.

(B) Name, Address and Charitable Tax Number (if not a municipality) of Recipient.

The business address of the recipient agency is required, usually a headquarters office for provincial, territorial, or national organizations.

(C) Legal Description.

A record of the description under a *Land Titles Act* or Land Registry system is required. General descriptions are not acceptable (e.g., "west of the bridge, 2 miles south of the village of Upper Rubber Boot").

(D) Type of Donation.

Clearly indicate whether the gift is title to the land or granting of an easement, covenant, or servitude under provincial/territorial legislation.

(E) Area.

The registered land title area of the site is required in hectares. A listing of how many half, quarter, etc., sections is not. Add up the total area and quote a figure. An approximate area is also acceptable if not surveyed.

If an easement, covenant, or servitude applies to only a portion of the site, only the gifted area should be recorded.

(F) Certification of Recipient.

- (a) nothing more required if listed in DOE Circular; or any incorporated municipality or Crown agency of any federal, provincial, or territorial government.
- (b) if not so listed, require documentation including charter and bylaws. One of its primary purposes must be "conservation of environmental heritage." Also require documentation of charitable status.

(G) Assessment of Ecological Character.

- (a) synthesize the description of the ecological values and criteria used below (b-g) into a short paragraph for the national tracking database.
- (b) what are the ecological values present? Of the total area, what are the proportions of various habitat types? Are there any buildings or other permanent structures on the property?

- (c) has the flora, fauna, fish, forestry, or other biodiversity of the site been recorded elsewhere? Make reference and attach if appropriate.
 - (d) what is the present condition of and threats to the site?
 - (e) which criteria are being used to suggest that it is "ecologically sensitive land"? Indicate specific (A) or general (B) criteria as published by DOE, or other. The field assessment (if needed, i.e., no previous surveys or criteria for ecological significance are unclear) is to be done by the donor or recipient.
 - (f) is there any local, regional, national, international, or other source of information ranking the "significance" of the site? Make reference and attach if appropriate.
 - (g) what is the condition of the site? Are site enhancement or rehabilitation proposed to "upgrade" the ecological quality?
 - (h) provide a map of the site, clearly indicating the area of the donation and where it is located.
- (H) Purpose of the Donation and Future Intentions.

Why is the donation is being made? What are the intentions for the future of the gifted property (e.g., long-term management or site enhancement)? An indication in writing or through a plan is required. Will a formal management plan be developed? Is changing the current use or ecological character or selling the land proposed? If so, are the donors aware of the penalty provisions under the *Income Tax Act*?

Appendix 4E

ECOLOGICAL GIFTS (ONTARIO) PROCESS

PROCESS FOR CERTIFYING ECOLOGICAL GIFTS IN ONTARIO

May 31, 1999

References are to Environment Canada's Environmental Conservation Branch (ECB), and to staff members Simon Llewellyn, Nancy Patterson, and Deb Lauder.

WHO	WHAT	HOW LONG
Donor	Express interest in donating land	
Recipient/Donor	Collection and summary of required information to support certification of land as ecologically sensitive	
Recipient	Submission of information to ECB (to D. Lauder's attention)	
ECB - DL	Review of submitted material (A-E), follow up with recipient for additional information if required	1 week
ECB - NP	Review of submitted material (F-H), follow up with recipient for additional information if required, site visit if required, make recommendation on certification to S. Llewellyn	3 weeks
ECB - SL	Completion and signing of Certificate (DOE 95-11)	1 week
Recipient	Notify ECB if receipt is either not issued or not used after certification is complete	
Recipient	Seek advice and approval from Environment Canada for change in land use or disposition for review (in writing)	
ECB - SL	Review and assess change in land use or disposition. Send written response.	3 weeks
Revenue Canada	Enforcement of penalty provisions if random audits reveal the need for penalties; or change in land use or disposition was not approved by ECB .	

Appendix 4F

GST CERTIFICATE

RE: The [name of land trust] purchase from [Vendor]
[legal description], (the "Property")

The undersigned hereby state and warrant and provide the within certificate as an inducement to the Purchaser to complete the Agreement of Purchase and Sale with respect to the above referred Property to be conveyed that it will, on the date of closing, fall into classification (insert applicable category below) of the following exceptions to the Goods and Services Tax (GST) and accordingly, no GST is either chargeable by the undersigned or payable by the Purchaser:

- (a) A long-term residential rent;
- (b) The sale of used residential housing that has not been substantially renovated;
- (c) The sale of personal-use land by an individual or trust;
- (d) The sale of farmland to a related individual who will be utilizing the lands and premises for personal use;
- (e) The sale constitutes the sale of real property by a charity, nonprofit organization, or other public service organization.

The sale falls within the definition of exceptions applicable to the above named classification under the provisions of the Goods and Services Tax and the regulations currently in effect with respect of the same.

DATED at this day of , [year].

Vendor



REQUEST BY A NON-RESIDENT OF CANADA FOR A CERTIFICATE OF COMPLIANCE RELATED TO THE DISPOSITION OF TAXABLE CANADIAN PROPERTY

T2062(E)
Rev. 95

- For use by a non-resident of Canada to provide notice of (a) the disposition of, or (b) the proposed disposition of, certain taxable Canadian property. Taxable Canadian property is properly described in paragraph 115(1)(b) of the Income Tax Act.
- For information concerning residency status in Canada, refer to the current release of Interpretation Bulletin IT-221, *Determination of an Individual's Residency Status*, or contact the International Tax Services Office at 952-3741 (calls from within the Ottawa area), 1-800-267-5177 (calls from other areas in Canada and the United States) or 613-952-3741 (calls from outside Canada and the United States). We accept collect calls from outside Canada and the United States.
- Copies 1 to 4 of this request must be filed at the Tax Services Office for the area in which the property is located.
- The notice for a disposition under subsection 116(3) must be sent by registered mail not later than 10 days after the date of disposition.

Check (✓) purpose for this notice

Proposed disposition: attach a copy of the offer to purchase.

Completed disposition: attach a copy of the agreement of sale and the statement of adjustments or a copy of the filed T2057 or T2058 election forms and the transfer agreement where a section 85 election is applicable.

Gifts of property inter-vivos: attach documentation to support fair market value.

Provide full address including as applicable street address, post office box, city, state, country and mail code.
(Refer to item 5 on the reverse of copy 5 for details concerning the requested identification numbers.)

Last name of non-resident (print)		First name & initial of non-resident (print)		Date of Birth			Date of departure from Canada		
				D	M	Y	D	M	Y
Present address of non-resident				(Canadian) Social Insurance Number or TTN					
				Non-resident Individual, Corporation or Business Account Number					
Person to contact for information - Name and address				Telephone					
Purchaser - Name and address				Telephone		Purchaser Identification Number			

1. Have you previously filed a T2062 or T2062A in the current calendar year? YES NO
If "YES", specify the Tax Services Office(s) where the request(s) were filed and indicate the name and address of the purchaser(s): _____

2. Is the disposition subject to an election under section 85? YES NO
If "YES", indicate the date of filing the section 85 election form and the Tax Services Office where the election form was filed: _____

3. Do you hold or contemplate holding a mortgage as a result of the disposition? YES NO

4. Have you received any income, including rents, royalties or lease payments, from the property?
 YES, income was received from the property (complete the following).

Non-resident tax was withheld. Indicate name and address of person who withheld the tax: _____

Non-resident tax was not withheld. Specify the period(s) that income was received from the property _____ to _____ (day, month, year) (day, month, year) (Attach income statements that indicate amount(s) of gross income.)

NO, income was not received from the property.

5. Do you have any outstanding balances for taxes, including income or excise taxes, custom duties, or the Goods & Services Tax (GST)? YES NO
If "YES", specify the identification or account number(s) related to the outstanding balance for taxes: _____

6. Indicate when and where you last filed a Canadian income tax return, if applicable:
Year _____ City _____ Province _____

7. Is the disposition to a person by way of gift of property inter-vivos or to a person with whom you are not dealing at arm's length? YES NO
If "YES" and the disposition is at less than fair market value enter the fair market value at the time of disposition in Column (4) below.

(1) Date of Proposed Date of Disposition	(2) Vendor's Acquisition Date	(3) Description - Refer to Item 3 on the reverse of Copy 5	(4) Estimated or Actual Amount of Proceeds of Disposition	(5) Adjusted Cost Base	(6) Gain or (Loss) Column (4) Less Column (5)
			\$	\$	\$
Net Gain or (Loss)					\$
(1990 and subsequent years - 33 1/3%)					\$

USE A SEPARATE LINE FOR EACH TYPE OF PROPERTY-- ATTACH A SCHEDULE IF SPACE IS NOT SUFFICIENT

Attachments: The following, if applicable, must accompany this request. Check (✓) which have been attached.

<input type="checkbox"/> Offer to Purchase or Purchase Agreement.	<input type="checkbox"/> Cheque or money order payable to the Receiver General.
<input type="checkbox"/> Sales Agreement, Statement of Adjustments or Transfer Agreement.	<input type="checkbox"/> Evidence that security has been provided.
<input type="checkbox"/> Calculation of Adjusted Cost Base.	<input type="checkbox"/> A T2062A which is being filed simultaneously with the T2062.
<input type="checkbox"/> Copy of section 85 election form T2057 or T2058.	<input type="checkbox"/> Schedule(s) where space is insufficient.
<input type="checkbox"/> List of name and addresses of all members where the property is held as joint tenancy, tenancy-in-common or co-ownership.	
<input type="checkbox"/> Documentation to support fair market value in respect of a section 85 election, a gift inter-vivos or a on-arm's length transfer at less than fair market value.	

CERTIFICATION

I, _____, certify that the information given on this form is, to the best of my knowledge, correct and complete.

Date (Signature of authorized person) (Position or office)

FOR DEPARTMENTAL USE ONLY

Subsidiary Ledger Account Number	Amount of Payment

Form acceptable to the Minister of National Revenue

Appendix 4H

THE NATURE CONSERVANCY OF CANADA FORM OF UNDERTAKING FOR PRESCRIBED DONEE

TO: Minister of National Revenue
AND TO: The [name of land trust]
RE: Donation of (*insert description of property*) by (*insert name of donor*), a nonresident of Canada, to The Nature Conservancy

IN CONSIDERATION of, and notwithstanding, the donation of the above transaction, the undersigned hereby undertake and agree as follows:

1. That the gift was received by the undersigned on (*insert date*).
2. Pursuant to Section 118.1(6)(b) of the *Income Tax Act (Canada)*, the undersigned is a prescribed donee.
3. The property will be used for conservation purposes, and will be held for use in the public interest.

DATED this day of , [year]

THE NATURE CONSERVANCY

Name:

Name:

Part 5

Land Use Planning

By Peter Hannah

November 1999

PART 5 - LAND USE PLANNING

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LAND USE PLANNING

Land-use planning is a very important function in Ontario's municipalities. It is intended to guide land development in an orderly and cost-effective pattern, identify and protect other areas from development, and to help ensure that the multiplicity of competing interests are considered in the ongoing process of land-use change. Ideally, land-use planning involves the inventorying and evaluation of current conditions, establishment of needs (setting goals, or establishing a vision for the future), setting policies to achieve those goals and implementing those policies through a variety of regulatory and non-regulatory mechanisms.

Planning is an open process involving the public and its elected officials and results in decisions which can be appealed by affected parties.

There are many interrelated components to the land-use planning system and they can be complex, time consuming and sometimes costly. As the population grows and development pressure increases, it becomes more important for municipalities to plan how to adapt and change over time.

Ontario's land-use planning process significantly affects the activities of land trusts, both positively and negatively. Anyone involved in land trusts should develop a basic understanding of the planning process and its components for several reasons:

- Planning, at both the provincial and municipal levels, establishes the broad policy framework for natural heritage protection. Land trusts can help to influence that framework but care must be exercised. Becoming a "lobby group" can jeopardize a land trust's charitable status.
- Municipal planning documents, particularly Official Plans, can provide policy support for land trusts and their activities, encouraging creative approaches to conservation, partnerships, etc. They also provide information on the location of sensitive areas or lands a trust may want to target.
- Various regulatory tools influence land donations, property valuations, land conveyances and land use. It may become necessary to seek changes in support of a particular property acquisition. A general knowledge of the process will be helpful.

The following subsections provide an overview of the hierarchy of planning elements, working from the senior level of government to the local level and from the broad policy documents down to the specific regulatory mechanisms. There are many exceptions to the rules! Advice is readily available from municipalities, other agencies and interest groups.

5.1 Provincial Planning

5.1.1 Planning Act

The *Planning Act* provides the legislative basis for the exercise of various planning powers by the Province of Ontario and its municipalities. The most recent significant changes to the *Planning Act* occurred under Bill 20, which was given royal assent on April 3, 1996. The *Planning Act* is now intended to result in a more efficient planning system grounded in clearly stated provincial policy. It is largely implemented through the actions of municipalities.

5.1.2 Provincial Interests

Provincial policy is established through several mechanisms:

- listing provincial interests;
- the establishment of the Provincial Policy Statement; and
- by approval of municipal Official Plans.

Section 2 of the *Planning Act* states the provincial interests and indicates that the minister, the council of a municipality, a local board, a planning board and the Ontario Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest. Those matters are listed as subsections (a) to (q). Of particular interest to land trusts are the first four subsections which address:

- protection of ecological systems, natural areas, features and functions;
- agricultural resources;
- conservation and management of natural resources; and
- conservation of features of significant architectural, cultural, historical, archaeological or scientific interest.

The complete list is included in Appendix 5A. The other provincial interests are equally important (e.g., adequate provision of a range of housing) and may sometimes conflict with these protective interests. None of these “interests” take precedence over the others.

5.1.3 Provincial Policy Statement

The Provincial Policy Statement (PPS) takes the provincial interests a step further by listing those matters it expects municipalities and other agencies to have regard to in exercising any authority that affects a planning matter and by stating more clearly some of the expected planning results. Before issuing a Policy Statement or an amendment, the Minister must confer with those the minister considers may have an interest in the matter. These could include representatives of the development industry, environmental groups, professional associations, municipal organizations, etc. Once

issued, the Policy Statement is published in the *Ontario Gazette* and is required to be reviewed every five years.

The current Provincial Policy Statement (PPS) came into effect on May 22, 1996 and replaced the former Comprehensive Set of Policy Statements. It was revised February 1, 1997 to address airport noise issues. A copy is included in Appendix 5B.

No particular element of the PPS takes precedence over another. All must be given regard in undertaking a planning function.

Of particular interest to land trusts may be Section 2.3, Natural Heritage, which describes those features and areas where development and site alteration will or will not be permitted. These include wetlands, habitat of endangered and threatened species, areas of natural and scientific interest, fish habitat, woodlands, valley lands and wildlife habitat. These terms are all defined in a definition section (see Appendix 5B) to help provide clarity. Section 2.4, Water Resources, will also be of interest to many land trusts.

It is important to differentiate between provincial and municipal responsibilities when considering natural heritage issues. The province, through the Ministry of Natural Resources, typically identifies:

- provincially significant wetlands;
- habitats of endangered and threatened species;
- areas of natural and scientific interest.

Municipalities are responsible for identifying and developing policies to protect the other areas, usually through the Official Plan. The province has developed a *Natural Heritage Reference Manual*, a good source of additional information.

5.1.4 Two-Tier Planning

Planning occurs at two levels in many municipalities. The upper tier consists of counties, regional municipalities and district municipalities; the lower tier is local municipalities such as cities, towns, villages and townships. An Official Plan (see Section 5.2 of this manual) is mandatory in a regional or district municipality, in a prescribed (by regulation) county and in local municipalities that do not form part of the county for municipal purposes. These are referred to as separated municipalities (e.g., Town of Gananoque, City of Brockville). Although they are geographically within the county, they are not represented on county council. For other municipalities, an Official Plan is discretionary.

Where the local municipality also has an Official Plan, Section 27 of the *Planning Act* requires it to conform with the upper-tier Official Plan. If a new upper-tier Official Plan or amendment is approved, the local municipality is required to bring its Official Plan into conformity with the upper-tier municipality's Official Plan within one year, failing which

the upper-tier municipality can take action to bring it into conformity without the lower tier's permission. In practice, this seldom happens. However, where the two Plans do conflict, the upper-tier Official Plan takes precedence.

5.1.5 Regulations

The *Planning Act* provides for the issuance of regulations which set out detailed requirements for applications (such as giving notice by mail, newspaper notice, card posted on the site or combinations, for example), appeals and other procedural matters. The following specific regulations are in effect:

- O.Reg. 196/96 PLANS OF SUBDIVISION
- O.Reg. 197/96 CONSENT APPLICATIONS
- O.Reg. 198/96 OFFICIAL PLANS AND PLAN AMENDMENTS
- O.Reg. 199/96 ZONING BY-LAWS, HOLDING BY-LAWS AND INTERIM CONTROL BY-LAWS
- O.Reg. 200/96 MINOR VARIANCE APPLICATIONS

They are available in any municipal office and should be consulted if a specific application is contemplated. These regulations were put into effect to implement the changes to the *Planning Act* under Bill 20. Various amendments to the Regulations have subsequently occurred.

5.1.6 Ontario Municipal Board

Many planning and other decisions, actions or inactions by municipalities can be appealed to the Ontario Municipal Board (OMB), an administrative tribunal established by the Ontario government to hear these appeals. Its decisions are generally final. They can no longer be appealed to cabinet although points of law can be appealed through the courts.

OMB members are appointed by cabinet. They have varied backgrounds; many are lawyers. There are also some planners, accountants, architects, surveyors, etc. A hearing panel is usually made up of one OMB member, although larger, more complex cases may involve a two-member or, in very rare cases, a three-member panel.

The procedures are generally court-like, with parties frequently represented by lawyers. Evidence is given under oath or by affirmation. Witnesses are cross-examined and the process is handled in an orderly, respectful and controlled manner.

The parties do not have to be represented by lawyers and hearings can become less formal if the circumstances warrant. Hearing panels strive to give all parties a fair hearing at the OMB and it is expected that parties be reasonably well prepared and make their points in a concise manner. Those abusing the process, such as not preparing properly, misusing the process for the purpose of delaying a development, or coming to a hearing without any relevant evidence, run the risk of having some or all of

the other party's costs assessed against them. This has actually occurred on many occasions.

At the end of the hearing, the board may give an oral decision or reserve its decision and provide it in writing later. This frequently can mean a delay of several months.

In recent years the OMB has made use of pre-hearing conferences, mediation and other alternative dispute-resolution techniques to help reduce the number and length of hearings. A delay of eight to ten months was once common but hearings now often occur within two to three months.

5.2 Official Plans

5.2.1 Purpose

The purpose of an Official Plan is to establish the municipality's policies for the future use of land, often for periods up to twenty years. In describing the contents of an Official Plan, Section 16(1)(a) of the *Planning Act* states that an Official Plan:

"shall contain goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality..."

Official Plans can manage and direct physical change in several ways:

- designate where uses can occur and under what conditions. In some cases this can involve limiting potential uses to protect natural values (e.g., not allowing development in significant wetlands);
- outline general land development policies (such as tree-saving, stream setbacks, parkland dedication) designed to ensure that all development occurs in an environmentally responsible fashion;
- include broad policies providing general encouragement and support for activities such as private stewardship, watershed planning or environmental monitoring. The City of Ottawa Official Plan, for example, specifically mentions land trusts.

Official Plans of upper-tier municipalities are generally approved by the Minister of Municipal Affairs and Housing. Official Plans of lower-tier municipalities are generally approved by the upper-tier municipality.

5.2.2 Legal Effects

Section 24(1) of the *Planning Act* requires any by-law passed by a municipality to conform to the Official Plan. It also requires any public work performed by the

municipality to conform to the Plan. Public work is defined as “any improvement of a structural nature or other undertaking that is within the jurisdiction of the council of a municipality or a local board.” Examples include road construction or sewer line extension.

In addition to these very specific legal impacts, the Official Plan can give specific guidance to decisions made on other planning matters, such as minor variances, subdivisions, consents and site plans.

5.2.3 Importance to Land Trusts

Official Plans are important documents from the perspective of a land trust for various reasons:

- As broad statements of policy and land-use philosophy, they set the groundwork for specific decisions. These policies can include creative implementation measures, such as land exchanges, easements, private land stewardship, and the establishment of environmental advisory committees, for example. Land trusts may want to participate in the process of preparing or updating an Official Plan to help ensure that sufficient attention is paid to natural heritage issues generally.
- Designation of sensitive lands in an Official Plan can be important to the qualification of land under the ecological gifts provisions of the *Income Tax Act*. Appendix 1 (Ontario) lists the specific categories of qualifying lands. Item A14 lists an automatic qualification for “areas within a municipal official plan or zoning by-law designated as an Environmentally Sensitive Area, Environmentally Significant Area, Environmental Protection Area, Restoration Area, Natural Heritage System or other designation for similar purposes that is compatible with the conservation of the biodiversity, ecological features and functions of the site.”
- Designating lands in an appropriate conservation category may assist in future “down-zoning” of land-trust property which could reduce property taxes. Down-zoning means amending the zoning by-law to place land in a category that permits less development.
- Unlike agencies that are exempt from the *Planning Act’s* subdivision control provisions (Crown agencies, municipalities, etc.), a land trust or other applicant must obtain a consent (often referred to as a severance) from a land division committee or committee of adjustment (these committees are established by municipalities and can include elected and/or non-elected persons) in order to convey part of a land holding. Supportive Official Plan policies assist in achieving this goal. Elsewhere in this manual, it is suggested that a land trust could obtain part of a land holding by having an agency which is exempt from the subdivision control requirements acquire it on the land trust’s behalf. This may not be well

received by the municipality and could jeopardize the trust's relationship with it. Caution should be exercised when considering this approach.

5.2.4 Process

During the process of preparing an Official Plan, a municipality is required to hold a minimum of one public meeting and to give at least twenty days notice of that meeting. These minimum requirements are frequently exceeded. Adequate information and a copy of the proposed plan must be available to the public. Persons attending the formal public meeting must be given an opportunity to make representations. It is important to attend the meeting and have that attendance noted in the official record or, alternatively, submit written comments prior to the passing of the Official Plan in order to preserve the right of appeal, should it be required later. The Ontario Municipal Board can dismiss an appeal if the appellant did not previously participate in the process.

Once council has adopted an Official Plan, it must give notice of that adoption within fifteen days to anyone who filed a written request to be notified of the passing of the Official Plan. Anyone interested should, therefore, file such written requests with the municipal clerk.

Some Official Plans may be exempt from formal approval, in which case, there is a twenty-day appeal period after the written notice has been given (Section 17(24)). This exemption is at the discretion of the approval authority (minister or upper-tier municipality) and it might be given if the approval authority is convinced the municipality is handling its planning functions thoroughly and responsibly. If an approval is required, a proposed decision will be issued, followed by a twenty-day appeal period (Section 17(36)).

When an individual or an organization files an appeal, an OMB hearing is generally held. However, Section 17(45) of the *Planning Act* permits the OMB to dismiss an appeal if the board is of the opinion that the reasons given for the appeal do not disclose any apparent land-use planning ground, the appeal is not made in good faith, or is frivolous or vexatious or made for the purpose of delay. Other reasons for dismissing an appeal are the failure of the appellant to make oral submissions at a public meeting or written submissions before the plan was adopted (as noted above), failure to provide written reasons for the appeal, failure to pay the appeal fee prescribed by the *Ontario Municipal Board Act* or failure to respond to a request by the OMB for further information.

The foregoing procedures apply to council-initiated Official Plans and amendments. Section 22 of the *Planning Act* establishes the procedure for applicants requesting amendments to Official Plans. These can be requested at any time. Similar procedures apply, including procedures allowing the applicant to appeal the request to the OMB if the municipality refuses the request or does not give notice of the required public meeting within forty-five days or fails to adopt the requested amendment within ninety days.

Official Plans are not intended to be static documents; they should be reviewed regularly. Section 26(1) of the *Planning Act* requires council to hold a special meeting open to the public to determine the need for a revision of the Official Plan at least once every five years. Notices for this meeting must be published in two separate weeks at least thirty days before the meeting. Some municipalities neglect to hold this statutory meeting and there is little provincial enforcement. Local interest groups sometimes become the chief mechanism ensuring the municipality fulfils its obligations.

5.2.5 Secondary Plans

Many Official Plans provide for the preparation of secondary plans that offer a greater level of detail for a portion of the municipality. These are usually incorporated into the overall Official Plan by amendment, following the normal Official Plan amendment process. A typical example would be the preparation of more detailed land-use designations for a growing serviced hamlet in a predominantly rural township.

5.3 **Zoning By-laws**

5.3.1 Purpose

A zoning by-law regulates land use and the erection, location and use of buildings and structures. It must conform to the Official Plan (Section 24 (l) of the *Planning Act*) and is a primary mechanism used to implement the policies of the Official Plan. In contrast to a municipality's Official Plan, the zoning by-law is a rigid, inflexible document which should be as free from uncertainty as possible. For example, an Official Plan might establish a policy requiring “adequate setbacks” from water bodies in order to protect water quality and shorelines, whereas a zoning by-law would specify a particular distance, such as thirty metres. An Official Plan might establish a policy discouraging an overdeveloped appearance or encouraging a low-impact use of a property, whereas the relevant zoning by-law might implement this policy by establishing a maximum lot coverage of five per cent (buildings must not cover more than five per cent of the lot).

Section 34 of the *Planning Act* establishes the municipality's authority to pass zoning by-laws and, in addition to regulating buildings, structures and land use, permits such by-laws to prohibit development on lands subject to natural (floodplains, unstable slopes) or artificial (former mine shaft areas) perils, contaminated lands, groundwater recharge or headwater areas, significant wildlife habitat, wetlands, woodlands, ravines, valleys or areas of natural and scientific interest, shorelines, or significant natural corridors.

5.3.2 Legal Effects

A zoning by-law is regarded as “applicable law” under the *Building Code Act*. This means that a building permit cannot be issued for a use that conflicts with a zoning by-

law. In contrast, an Official Plan is not “applicable law” and requires a zoning by-law in order to give many of its policies legal effect.

A zoning by-law is not retroactive. Any use which legally existed on the date the zoning by-law was passed can continue. Rights to continue these “legal non-conforming uses” are firmly entrenched in Section 34 (9) of the *Planning Act* and in case law. An extension to the use, an enlargement of a structure, or any change in the use (unless it is being converted to a use that conforms to the zoning By-law) must first be approved through a committee of adjustment in a process similar to a minor variance, or by council, as an amendment to the zoning by-law.

5.3.3 Importance to Land Trusts

Zoning by-laws are important documents from the perspective of a land trust for various reasons:

- Zoning of sensitive lands in a zoning by-law can be important to the qualification of land under the ecological gifts provisions of the *Income Tax Act*. Appendix 1 (Ontario) lists the specific categories of qualified lands. Item A14 lists an automatic qualification for “areas within a Municipal official plan or zoning by-law designated as an Environmentally Sensitive Area, Environmentally Significant Area, Environmental Protection Area, Restoration Area, Natural Heritage System or other designation for similar purposes that is compatible with the conservation of the biodiversity, ecological features and functions of the site.”
- Restrictive zoning on sensitive lands can help a land trust target potential acquisition areas; conversely, or in addition, some trusts may prefer to target lands where significant development could occur. The permitted uses described in the relevant zone category will help to identify these areas.
- The zoning of a parcel of land donated to a land trust can influence its value and, therefore, the property taxes payable. In some cases, it is prudent for the trust to seek a rezoning of lands it acquires in order to remove development rights and result in a lower property assessment. The timing of any such rezoning should be carefully considered since it could affect the amount of the charitable receipt, negatively affecting the donor. If the Conservation Lands Tax Incentive Program (CLTIP) is revised to include conservation lands held by charitable organizations such as land trusts, rezoning may not be of any taxation benefit.
- The zoning by-law category in which the land is placed will provide an indication to the surrounding community of its intended use or ecological significance.
- Restrictive, conservation-oriented zoning may help the land trust with its fundraising activities since donors will be more comfortable in the knowledge that long-term preservation is intended.

5.3.4 Process

Similar to the process required for Official Plans, a municipal council must hold a public meeting prior to considering the passage of a zoning by-law or a zoning by-law amendment. A minimum notice period of twenty days is required before a public meeting (Section 34(12) and (13) of the *Planning Act*).

Notice of the passing of a by-law must be given within fifteen days of passage by council (Section 34(18)), followed by a twenty-day appeal period (Section 34(19)).

The OMB can dismiss an appeal without holding a hearing for similar reasons as those described with respect to the Official Plan (see Subsection 5.2.4. of this manual).

5.3.5 Related Matters

Some zoning by-laws include a holding provision where the symbol “H” or “h” is attached to a zone. This delays the land uses permitted by the given zone until certain conditions have been met (Section 36). These could include completion of specific studies, extension of sewer, water and other services, or entering into agreements. The general public cannot appeal the removal of a holding symbol, but can appeal the institution of the holding provision in the first place.

Council can also pass an interim control by-law where it identifies a problem, agrees to undertake a study of it, and to take action to institute permanent zoning within one year plus a possible one-year extension. This is a somewhat extraordinary power in that notice is not given before its passing. It therefore needs to be used with caution by municipalities (Section 38).

Temporary-use zoning can also be put in place (Section 39) for a period of up to three years, and can be extended for periods of up to three years. Normal zoning by-law procedures apply.

5.4 **Minor Variances**

5.4.1 Purpose

As the name implies, a minor variance is a type of relief given from the strict application of the provisions contained in a zoning by-law (Section 45 of the *Planning Act*). For example, a zoning by-law might require a ten-foot minimum side yard (i.e., ten feet between a building and the side property line), but a particular house design requires a reduction to eight feet. Neighbours are notified and a process of input and appeal is available.

5.4.2 Process

Case law has established a set of four tests flowing from Section 45(1) of the *Planning Act*. For a variance application to succeed, it must meet all four tests. To fail, it need only contravene one of them. The four tests are:

- that the application is “minor”;
- that it is desirable for the appropriate development or use of the land, building or structure;
- the general intent and purpose of the by-law are maintained;
- the general intent and purpose of the Official Plan are maintained.

The committee of adjustment gives at least ten days notice before a matter is heard. Notice of the committee’s decision is given not later than ten days after the decision and is provided to each person who appeared in person or through a lawyer or an agent at the hearing and who filed a written request for notice of the decision. A twenty-day appeal period follows. The OMB can dismiss the appeal without holding a hearing for similar reasons as noted in Section 5.2.4 concerning Official Plans.

5.5 **Lot Creation**

In Ontario, property cannot be divided (severed) or a portion of a property (legally conveyable lot) sold without specific approval. These include the conveyance of any “right in land” including a right-of-way or easement, such as a conservation easement. (Some lawyers argue that a conservation easement can be placed on the entire property without requiring a consent.) The following subsections outline the most common approval mechanisms and related issues.

5.5.1 Subdivision Control

Section 50(3) of the *Planning Act* prohibits the conveyance of land or a right in land for any period of twenty-one years or more unless:

- it is the entire holding;
- it is a lot in a registered plan;
- it is given consent by a committee of adjustment or land division committee; or
- one of the parties to the conveyance is the Crown.

Although the twenty-one-year period is arbitrary, it is intended to allow for temporary leasing or other short-term commitments without going through onerous procedures.

5.5.2 Subdivisions

Section 51 of the *Planning Act* sets out the process for subdivision approval, the process considered preferable to the consent process for the creation of multiple lots.

Land described as a “lot on a registered plan of subdivision” can be sold separately. Lands described as a “part on a reference plan” cannot be sold unless they are first given consent approval (see Subsection 5.5.3 below).

From time to time, land trusts may be offered parcels of land within a subdivision which may be described as either a lot or a block. In either case, if it is a full lot or block within a registered plan of subdivision, the property can be transferred; otherwise, it will have to be legally severed, generally through the consent process.

5.5.3 Consents

Consents (commonly called severances) are usually the responsibility of a municipality's land division committee or committee of adjustment. Under Section 53 of the *Planning Act*, this process is used for the creation of single lots or a very few lots in a process similar to that used for subdivision approval. This would be the usual process for a potential land donor who wants to separate the dwelling they may wish to retain (with a small amount of land around it) from the large “vacant” lands they propose to convey to a land trust. Some of the issues the committee will consider are provincial interests, the public interest, Official Plan conformity, suitability of the land for the intended purpose, restrictions on the land (zoning), and conservation of natural resources. This list of issues points to the need to have supporting policies in the Official Plan and the desirability of supporting provisions in the zoning by-law.

5.5.4 Rights-of-Way/Easements

Because a right-of-way or an easement, including a conservation easement, is one of the “rights in land” regulated under subdivision control, it is necessary to obtain consent approval from a municipality's land division committee or committee of adjustment in order to convey that interest to a land trust. An example of this is when an owner wishes to protect an area within 120 metres of a wetland and conveys a conservation easement for just the part of the lands abutting the water. Another example is when the donor wishes to convey land to a land trust but needs a right-of-way for legal access to his retained dwelling and adjacent lands.

5.5.5 Exemptions

An exemption from the subdivision control provisions of Section 50(3) of the *Planning Act* is extended to conservation authorities under very specific conditions:

“The land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under Section 24 of the *Conservation Authorities Act* and in respect of which an officer of the Conservation Authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such

purposes, which shall be conclusive evidence that it is being acquired for such purposes.”

This is a limited exception and is not intended to be used to avoid normal processes. In these circumstances, a consent is not required.

5.6 **Site Plan Control**

5.6.1 Purpose

Section 41 of the *Planning Act* establishes provisions for site plan control, the purpose of which is to control the arrangement of uses on a property, including buildings, structures, walkways, lighting, walls, fences, drainage works, easements, grading, vegetation, etc. An enabling policy in the Official Plan is a prerequisite to the municipal use of site plan control, as is the passage of a site plan control by-law.

Site plan control usually applies to more intensive commercial and industrial uses, but many municipalities use it in waterfront areas to help control impacts on water bodies by preventing erosion and requiring vegetation to be retained. The site plan and potential site plan control agreement between the landowner and the municipality runs with the land (continues to apply even if the land is sold to a new owner). The land trust acquiring a property that has an unacceptable site plan on it would have to seek municipal approval for a change. This usually involves an application fee, a review by the municipality, approval and registration on title.

5.6.2 Process

Besides the prerequisite Official Plan policy and site plan control by-law, the site plan approval process is a two-party process (applicant and municipality). Municipalities often seek community input but the municipal decision is final and not subject to appeal by a third party. An applicant can, however, appeal council's refusal of a site plan.

5.7 **Other Land-Use Planning Considerations**

5.7.1 Watershed/Sub-watershed Planning

Municipalities, sometimes through conservation authorities, are becoming increasingly involved in watershed-based planning, an integrated approach to land-use planning within an area drained by a major watercourse and its tributaries. Watershed planning focuses on the various goals and measures needed to support the health of a watershed. This involves examining the balance between development and environmental goals in the context of long-term ecological sustainability, and setting development strategies to manage change and address specific problems in a watershed. These can range from encouraging responsible private land-management

practices to the protection of specific natural areas. Subwatershed planning is a more detailed planning exercise that seeks to balance development and conservation goals for smaller sub-areas, preferably within the context of the watershed plan. Although there are no specific *Planning Act* provisions for watershed or subwatershed planning, it is implemented through the mechanisms (Official Plans, site plans, etc.) previously described in this chapter.

5.7.2 Environmental Assessment

Environmental Assessments (EAs) occur under either federal or provincial legislation and are sometimes integrated into planning processes. Specific linkage between the planning process and the environmental assessment process is provided in Section 16.1 of the *Planning Act* which permits (but does not require) a municipality to follow the prescribed processes of the provincial *Environmental Assessment Act* when preparing an Official Plan. As a result, the Official Plan becomes the basis for Phases 1 and 2 of the Class Environmental Assessment process in Ontario for a specific project meeting an identified need. Typical projects subject to EA approvals include roadways outside of subdivisions, bridges, and municipal water supply and sewage treatment systems.

5.7.3 Application Fees

In a time of increased downloading by the provincial government, more and more municipalities, conservation authorities and utilities are establishing application fees for any process an applicant may wish to initiate. Section 69 of the *Planning Act* establishes the authority for a municipality to pass a tariff or fees by-law “which tariff shall be designed to meet only the anticipated cost to the municipality in respect of the processing of each type of application.” These fees can be substantial, \$500 to \$5,000 or more. Section 69(2) permits the municipality to reduce or waive a fee, a response which may be appropriate for an application from a nonprofit organization like a land trust.

5.7.4 Northern Ontario

Some of the *Planning Act* functions are different in northern Ontario due to the absence of municipal organization (no elected municipal government) in many areas. Here, the Minister of Municipal Affairs and Housing is responsible for defining a planning Area and appointing members to a planning board. The planning board acts in lieu of a municipal council.

5.8 **List of Appendices**

5A Listing of Provincial Interests

5B Provincial Policy Statement
February 1, 1997

Appendix 5A

REQUIREMENT TO HAVE REGARD FOR PROVINCIAL INTERESTS

2. The Minister, the council of a municipality, a local board, a planning board and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

- (a)** the protection of ecological systems, including natural areas, features and functions;
- (b)** the protection of the agricultural resources of the Province;
- (c)** the conservation and management of natural resources and the mineral resource base;
- (d)** the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;
- (e)** the supply, efficient use and conservation of energy and water;
- (f)** the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
- (g)** the minimization of waste;
- (h)** the orderly development of safe and healthy communities;
- (i)** the adequate provision and distribution of educational, health, social, cultural and recreational facilities;
- (j)** the adequate provision of a full range of housing;
- (k)** the adequate provision of employment opportunities;
- (l)** the protection of the financial and economic well-being of the Province and its municipalities;
- (m)** the co-ordination of planning activities of public bodies;
- (n)** the resolution of planning conflicts involving public and private interests;
- (o)** the protection of public health and safety;
- (p)** the appropriate location of growth and development. 1994, c. 23, s. 5; 1996, c. 4. s. 2.

Appendix 5B

PROVINCIAL POLICY STATEMENT

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Preamble

This Policy Statement is issued under the authority of Section 3 of the Planning Act. It provides policy direction on matters of provincial interest related to land use planning and development. The policies focus on the key provincial interests related to land use planning. These policies will be complemented by locally-generated policies regarding matters of local interest.

Section 3 of the Planning Act requires that, in exercising any authority that affects planning matters, planning authorities "shall have regard to" policy statements issued under the Act.

The Policy Statement is intended to promote a policy-led system which recognizes that there are complex inter-relationships among environmental, economic and social factors in land use planning.

A healthy economy is vital to Ontario's ongoing prosperity. Wisely managed growth can result in communities which are economically and environmentally sound, and which meet the full range of needs of their current and future residents. Doing things right the first time can avoid the need for costly remedial measures to correct problems.

The Province's resources - its agricultural land base, mineral resources, natural heritage resources, water supply and cultural heritage resources - provide economic, environmental and social benefits. The wise use and protection of these resources over the long term is a key provincial interest.

Equally, the Province has an interest in protecting the long term health and safety of the population, and the financial and economic well-being of the Province and municipalities.

Principles

Ontario's long term economic prosperity, environmental health and social well-being depend on:

1. managing change and promoting efficient, cost-effective development and land use patterns which stimulate economic growth and protect the environment and public health;
2. protecting resources for their economic use and/or environmental benefits; and
3. reducing the potential for public cost or risk to Ontario's residents by directing development away from areas where there is a risk to public health or safety or of property damage.

Policies

It is the policy of the Province of Ontario that:

1.1 Developing Strong Communities

1.1.1 Subject to the provisions of policy 1.1.2, cost-effective development patterns will be promoted. Accordingly:

- a. Urban areas and rural settlement areas (cities, towns, villages and hamlets) will be the focus of growth;
- b. Rural areas will generally be the focus of resource activity, resource-based recreational activity and other rural land uses;
- c. Urban areas and rural settlement areas will be expanded only where existing designated areas in the municipality do not have sufficient land supply to accommodate the growth projected for the municipality. Land requirements will be determined in accordance with policy 1.1.2. The policies of Section 2: Resources, and Section 3: Public Health and Safety will be applied in the determination of the most appropriate direction for expansions. Expansions into prime agricultural areas are permitted only where:
 1. there are no reasonable alternatives which avoid prime agricultural areas; and
 2. there are no reasonable alternatives with lower priority agricultural lands in the prime agricultural area;
- d. Development and land use patterns that would hinder the efficient expansion of urban areas or rural settlement areas are not permitted in adjacent areas;
- e. A coordinated approach should be achieved when dealing with issues which cross municipal boundaries, including:
 1. infrastructure and public service facilities;
 2. ecosystem and watershed related issues;
 3. shoreline and river line hazards; and
 4. housing and employment projections, based on housing market areas.Where upper tier planning takes place, projections for municipalities will be coordinated and allocated by upper tier governments, in consultation with lower tier governments;
- f. Development and land use patterns which may cause environmental or public health and safety concerns will be avoided; and
- g. In territory without municipal organization, the focus of development activity will be resource activities and resource-based recreational activities, with the following restrictions:
 1. The establishment of new permanent townsites is not permitted; and

2. Development other than resource activity and resource-based recreational activity will be restricted in the area adjacent to and surrounding municipalities unless:
 - the area forms part of a planning area; and
 - it has been determined, as part of a comprehensive planning exercise, that the impacts of growth will not place an undue strain on the public service facilities and infrastructure of the adjacent municipality.

1.1.2 Land requirements and land use patterns will be based on:

- a. the provision of sufficient land for industrial, commercial, residential, recreational, open space and institutional uses to promote employment opportunities, and for an appropriate range and mix of housing, to accommodate growth projected for a time horizon of up to 20 years. (However, where a longer time period has been established for specific areas of the Province as a result of a comprehensive provincial planning exercise, such as that coordinated by the Province in the Greater Toronto Area, that time frame may be used for upper and lower tier municipalities within the area);
- b. densities which:
 1. efficiently use land, resources, infrastructure and public service facilities;
 2. avoid the need for unnecessary and/or uneconomical expansion of infrastructure;
 3. support the use of public transit, in areas where it exists or is to be developed;
 4. are appropriate to the type of sewage and water systems which are planned or available; and
 5. take into account the applicable policies of Section 2: Resources, and Section 3: Public Health and Safety;
- c. the provision of a range of uses in areas which have existing or planned infrastructure to accommodate them;
- d. development standards which are cost effective and which will minimize land consumption and reduce servicing costs; and
- e. providing opportunities for redevelopment, intensification and revitalization in areas that have sufficient existing or planned infrastructure.

1.1.3 Long term economic prosperity will be supported by:

- a. making provisions such that infrastructure and public service facilities will be available to accommodate projected growth;
- b. providing a supply of land to meet long term requirements, in accordance with policy 1.1.2;
- c. providing for an efficient, cost-effective, reliable, multi-modal transportation system that is integrated with adjacent systems and those of other jurisdictions and is appropriate to address expected growth;

- d. conserving energy and water by providing for energy and water efficiency;
- e. maintaining the well-being of downtowns and main streets;
- f. optimizing the long-term availability and the use of agricultural and other resources; and
- g. planning so that major facilities (such as airports, transportation corridors, sewage treatment facilities, waste management systems, industries and aggregate activities) and sensitive land uses are appropriately designed, buffered and/or separated from each other to prevent adverse effects from odour, noise and other contaminants.

To protect airports from incompatible development:

- 1. New residential development and other sensitive land uses will be prohibited in areas near airports above 30 NEF/NEP, as set out on maps (as revised from time to time) approved by Transport Canada; but
- 2. Redevelopment of existing residential uses and other sensitive land uses or infilling of residential and other sensitive land uses may be considered above 30 NEF/NEP if it has been demonstrated that there will be no negative impacts on the long-term function of the airport.

1.2 Housing

1.2.1 Provision will be made in all planning jurisdictions for a full range of housing types and densities to meet projected demographic and market requirements of current and future residents of the housing market area by:

- a. maintaining at all times at least a 10-year supply of land designated and available for new residential development and residential intensification;
- b. maintaining at all times, where new development is to occur, at least a 3-year supply of residential units with servicing capacity in draft approved or registered plans;
- c. encouraging housing forms and densities designed to be affordable to moderate and lower income households;
- d. encouraging all forms of residential intensification in parts of built-up areas that have sufficient existing or planned infrastructure to create a potential supply of new housing units available from residential intensification; and
- e. establishing cost-effective development standards for new residential development and redevelopment to reduce the cost of housing.

1.3 Infrastructure

1.3.1 SEWAGE AND WATER SYSTEMS

1.3.1.1 Planning for sewage and water systems will recognize that:

- a. full municipal sewage and water services are the preferred form of servicing for urban areas and rural settlement areas. In areas serviced by full municipal sewage and water services, lot creation will be permitted only if sufficient reserve water and sewage plant capacity will be available to accommodate it;
- b. communal services are the preferred means of servicing multiple lots/units in areas where full municipal sewage and water services are not or cannot be provided, where site conditions are suitable over the long term; and
- c. lot/unit creation may be serviced by individual on-site systems where the use of communal systems is not feasible and where site conditions are suitable over the long term; but
- d. partial services will be discouraged except where necessary to address failed services, or because of physical constraints.

1.3.2 TRANSPORTATION

1.3.2.1 Transportation systems will be provided which are safe, environmentally sensitive, and energy efficient.

1.3.3 TRANSPORTATION CORRIDORS AND INFRASTRUCTURE CORRIDORS

1.3.3.1 Corridors and rights-of-way for significant transportation and infrastructure facilities will be protected.

1.3.4 WASTE MANAGEMENT

1.3.4.1 Waste management systems need to be provided that are of an appropriate size and type to accommodate present and future requirements, and will be located and designed in accordance with provincial standards and legislation.

2.1 Agricultural Policies

2.1.1 Prime agricultural areas will be protected for agriculture. Permitted uses and activities in these areas are: agricultural uses; secondary uses; and agriculture-related uses. Proposed new secondary uses and agriculture-related uses will be compatible with, and will not hinder, surrounding agricultural operations.

2.1.2 Lot creation in prime agricultural areas is generally discouraged and will be permitted only in the following situations:

- a. new lots for agricultural uses may be permitted provided that they are of a size appropriate for the type of agricultural use(s) common in the area and are sufficiently large to maintain flexibility for future changes in the type or size of agricultural operation;
- b. new lots may be permitted for agriculture-related uses; and
- c. new lots for residential uses may be permitted for:
 1. a farm retirement lot;
 2. a residence surplus to a farming operation; and

3. residential infilling.

Any new lot for residential uses will be limited to a minimum size needed to accommodate the residence and an appropriate sewage and water system.

2.1.3 An area may be excluded from prime agricultural areas only for:

- a. an expansion of an urban area or rural settlement area, in accordance with policy 1.1.1c);
- b. extraction of mineral resources, in accordance with policy 2.2; and
- c. limited non-residential uses, provided that:
 1. there is a demonstrated need for additional land to be designated to accommodate the proposed use;
 2. there are no reasonable alternative locations which avoid prime agricultural areas; and
 3. there are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands.

Impacts from any new non-agricultural uses on surrounding agricultural operations and lands will be mitigated.

2.1.4 New land uses, including the creation of lots, and new or expanding livestock facilities will comply with the minimum distance separation formulae.

2.1.5 In prime agricultural areas, agricultural uses and normal farm practices will be promoted and protected.

2.2 Mineral Resources: Mineral Aggregates, Minerals, Petroleum Resources

2.2.1 Mineral resources (mineral aggregates, minerals and petroleum resources) will be protected for long term use.

2.2.2 MINERALS AND PETROLEUM RESOURCES

2.2.2.1 Mineral mining operations and petroleum resource operations will be protected from activities that would preclude or hinder their expansion or continued use or which would be incompatible for reasons of public health, public safety or environmental impact.

2.2.2.2 In areas adjacent to or in known mineral deposits or known petroleum resources, and in areas of mineral potential, development which would preclude or hinder the establishment of new operations or access to the resources will only be permitted if:

- a. resource use would not be feasible; or
- b. the proposed land uses or development serves a greater long term public interest; and
- c. issues of public health, public safety and environmental impact are addressed.

2.2.2.3 Rehabilitation to accommodate subsequent land uses will be required after extraction and other related activities have ceased. Progressive rehabilitation will be undertaken where feasible.

2.2.2.4 Extraction of minerals and petroleum resources is permitted in prime agricultural areas, provided that the site is rehabilitated.

2.2.3 MINERAL AGGREGATES

2.2.3.1 As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible.

2.2.3.2 Mineral aggregate operations will be protected from activities that would preclude or hinder their expansion or continued use or which would be incompatible for reasons of public health, public safety or environmental impact. Existing mineral aggregate operations will be permitted to continue without the need for official plan amendment, rezoning or development permit under the Planning Act.

2.2.3.3 In areas adjacent to or in known deposits of mineral aggregates, development which would preclude or hinder the establishment of new operations or access to the resources will only be permitted if:

- a. resource use would not be feasible; or
- b. the proposed land uses or development serves a greater long term public interest; and
- c. issues of public health, public safety and environmental impact are addressed.

2.2.3.4 Wayside pits and quarries and portable asphalt plants used on public authority contracts will be permitted, without the need for official plan amendment, rezoning, or development permit under the Planning Act in all areas, except those areas of existing development or particular environmental sensitivity which have been determined to be incompatible with extraction and associated activities.

2.2.3.5 Progressive rehabilitation to accommodate subsequent land uses will be required.

2.2.3.6 In prime agricultural areas, on prime agricultural land, extraction of mineral aggregates is permitted as an interim use provided that rehabilitation of the site will be carried out whereby substantially the same areas and same average soil quality for agriculture are restored.

On these prime agricultural lands, complete agricultural rehabilitation is not required if:

- a. there is a substantial quantity of mineral aggregates below the water table warranting extraction; or
- b. the depth of planned extraction in a quarry makes restoration of pre extraction agricultural capability unfeasible; and
- c. other alternatives have been considered by the applicant and found unsuitable¹; and
- d. agricultural rehabilitation in remaining areas will be maximized.

2.3 Natural Heritage

2.3.1 Natural heritage features and areas will be protected from incompatible development.

- a. Development and site alteration will not be permitted in:
 - o significant wetlands south and east of the Canadian Shield; and
 - o significant portions of the habitat of endangered and threatened species.
- b. Development and site alteration may be permitted in:
 - o fish habitat;
 - o significant wetlands in the Canadian Shield²;
 - o significant woodlands south and east of the Canadian Shield²;
 - o significant valley lands south and east of the Canadian Shield²;
 - o significant wildlife habitat; and
 - o significant areas of natural and scientific interest

if it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified.

2.3.2 Development and site alteration may be permitted on adjacent lands to a) and b) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified.

2.3.3 The diversity of natural features in an area, and the natural connections between them should be maintained, and improved where possible.

2.3.4 Nothing in policy 2.3 is intended to limit the ability of agricultural uses to continue.

2.4 Water Quality and Quantity

2.4.1 The quality and quantity of ground water and surface water and the function of sensitive ground water recharge/discharge areas, aquifers and headwaters will be protected or enhanced.

2.5 Cultural Heritage and Archaeological Resources

2.5.1 Significant built heritage resources and cultural heritage landscapes will be conserved.

2.5.2 Development and site alteration may be permitted on lands containing archaeological resources or areas of archaeological potential if significant archaeological resources have been conserved by removal and documentation, or preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site will be permitted.

3.1 Natural Hazards

3.1.1 Development will generally be directed to areas outside of:

- a. hazardous lands adjacent to the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes which are impacted by flooding, erosion, and/or dynamic beach hazards;
- b. hazardous lands adjacent to river and stream systems which are impacted by flooding and/or erosion hazards; and
- c. hazardous sites.

3.1.2 Development and site alteration will not be permitted within:

- a. defined portions of the dynamic beach;
- b. defined portions of the one hundred year flood level along connecting channels (the St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers); and
- c. a floodway (except in those exceptional situations where a Special Policy Area has been approved).

3.1.3 Except as provided in policy 3.1.2, development and site alteration may be permitted in hazardous lands and hazardous sites, provided that all of the following can be achieved:

- a. the hazards can be safely addressed, and the development and site alteration is carried out in accordance with established standards and procedures;
- b. new hazards are not created and existing hazards are not aggravated;
- c. no adverse environmental impacts will result;
- d. vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies; and
- e. the development does not include institutional uses or essential emergency services or the disposal, manufacture, treatment or storage of hazardous substances.

3.2 Human-made Hazards

3.2.1 Development on, abutting or adjacent to lands affected by mine hazards or former mineral resource operations will be permitted only if rehabilitation measures to address and mitigate known or suspected hazards are under-way or have been completed.

3.2.2 Contaminated sites will be restored as necessary prior to any activity on the site associated with the proposed use such that there will be no adverse effect.

Implementation/ Interpretation

1. The Provincial Policy Statement came into effect on the date of proclamation of Bill 20, and applies to all applications submitted after that date. Planning authorities "shall have regard to" the policy statement in making decisions on all applications submitted on or after the proclamation date, and to all applications which were commenced on or after March 28, 1995 and in respect of which no decision had been made on the date of proclamation. The Provincial Policy Statement replaces the Comprehensive Set of Policy Statements.

Section 75 of the Planning Act provides when an application is considered to have commenced and when a decision is considered to have been made for the purposes of this section. 2.

Nothing in this policy statement is intended to prevent planning authorities from going beyond the minimum standards established in specific policies, in developing official plan policies and when making decisions on planning matters, unless doing so would conflict with any other policy. The Provincial Policy Statement is to be read in its entirety, and all pertinent policies are to be applied to each situation.

3. The Province, in developing and amending provincial plans, will have regard to these policy statements. Provincial plans, such as those adopted under the Ontario Planning and Development Act, 1994 or the Niagara Escarpment Planning and Development Act, which have been approved by the Lieutenant Governor in Council, will take precedence over policies in this statement.

4. These policies are to be applied in dealing with planning matters. Official plans will integrate all applicable provincial policies and apply appropriate land use designations and policies. Since the policies focus on end results, the official plan is the most important vehicle for the implementation of the Policy Statement.

5. Infrastructure may be authorized under legislation other than or in addition to the Planning Act. Other authorizing legislation may include the Environmental Assessment Act, the Ontario Energy Board Act, and the Ontario Water Resources Act. An environmental assessment process may be applied to new infrastructure and modifications to existing infrastructure under applicable legislation. The applicable policies would be considered as part of the evaluation conducted under the relevant environmental assessment process.

6. The Province, in consultation with municipalities, will identify performance indicators for measuring the effectiveness of some or all of the policies, and will monitor their implementation. Municipalities are encouraged to establish performance indicators to monitor the implementation of the policies in their official plans.

Definitions

Adjacent lands:

means those lands, contiguous to a specific natural heritage feature or area, where it is likely that development or site alteration would have a negative impact on the feature or area. The extent of the adjacent lands may be recommended by the Province or based on municipal approaches which achieve the same objectives.

Adverse effects:

as defined in the Environmental Protection Act, means one or more of:

- impairment of the quality of the natural environment for any use that can be made of it;
- injury or damage to property or plant and animal life;
- harm or material discomfort to any person;
- an adverse effect on the health of any person;
- impairment of the safety of any person;
- rendering any property or plant or animal life unfit for use by humans;
- loss of enjoyment of normal use of property; and

- interference with normal conduct of business.

Agricultural uses:

means the growing of crops, including nursery and horticultural crops; raising of livestock and other animals for food, or fur, including poultry and fish; aquaculture; agro-forestry; maple syrup production; and associated on-farm buildings and structures.

Agriculture-related uses:

means those farm related commercial and farm-related industrial uses that are small scale and directly related to the farm operation and are required in close proximity to the farm operation.

Airports:

means all Ontario airports, including designated lands for future airports, with Noise Exposure Forecast (NEF)/Noise Exposure Projection (NEP) mapping.

Areas of archaeological potential:

means areas with medium or high potential for the discovery of archaeological resources. This potential is based on the presence of a wide range of geographic and historical features which influenced past settlement. Archaeological potential is confirmed through archaeological assessment.

Areas of mineral potential:

means areas favourable to the discovery of mineral deposits due to geology, the presence of known mineral deposits or other technical evidence. Areas of mineral potential are identified using accepted scientific methodology.

Areas of natural and scientific interest (ANSI):

means areas of land and water containing natural landscapes or features that have been identified as having life science or earth science values related to protection, scientific study, or education.

Built heritage resources:

means one or more buildings, structures, monuments, installations, or remains associated with architectural, cultural, social, political, economic, or military history, and identified as being important to a community.

Cultural heritage landscape:

means a defined geographical area of heritage significance which has been modified by human activities. Such an area is valued by a community, and is of significance to the understanding of the history of a people or place.

Defined portions of a dynamic beach:

means those portions of the dynamic beach which are highly unstable and/or critical to the natural protection and maintenance of the first main dune feature and/or beach profile, where any development or site alteration would create or aggravate flooding or erosion hazards, cause up drift and/or down drift impacts and/or cause adverse environmental impacts.

Defined portions of the one hundred year flood level along connecting channels:

means those areas which are critical to the conveyance of the flows associated with the one hundred year flood level along the St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers, where development or site alteration will create flooding hazards, cause up drift and/or down drift impacts and/or cause adverse environmental impacts.

Deposits of mineral aggregates:

means an area of identified mineral aggregates that has a sufficient quantity and quality to warrant present or future extraction.

Designated and available:

means, for the purposes of Policy 1.2.1a), designated in the official plan for urban residential use. For municipalities where more detailed official plan policies (e.g. secondary plans) are required before development applications can be considered for approval, only lands that have at least begun the more detailed planning process are considered to be designated for the purposes of this definition.

Development:

means the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the Planning Act; but does not include activities that create or maintain infrastructure authorized under an environmental assessment process; or works subject to the Drainage Act.

Dynamic beach:

means areas of inherently unstable accumulations of shoreline sediments along the Great Lakes- St. Lawrence River System and large inland lakes. The dynamic beach hazard limit includes the flooding hazard limit plus a dynamic beach allowance.

Ecological functions:

means the natural processes, products or services that living and non-living environments provide or perform within or between species, ecosystems and landscapes. These may include biological, physical and socio-economic interactions.

Endangered species:

means any native species, as listed in the Regulations under the Endangered Species Act, that is at risk of extinction throughout all or a significant portion of its Ontario range if the limiting factors are not reversed.

Erosion hazards:

means the loss of land, due to human or natural processes, that poses a threat to life and property. The erosion hazard limit is determined using the 100 year erosion rate (the average annual rate of recession extended over a hundred year time span), an allowance for slope stability, and an erosion allowance.

Essential emergency services:

means services such as those provided by fire, police and ambulance stations and electrical substations, which would be impaired during an emergency as a result of flooding, the failure of flood proofing measures and/or protection works, and/or erosion.

Established standards and procedures:

means the following:

- Flood proofing standard, which means the combination of measures incorporated into the basic design and/or construction of buildings, structures, or properties to reduce or eliminate flooding, wave up rush and other water related hazards along the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes, and flooding along river and stream systems.
- Protection works standard, which means the combination of non-structural or structural works and allowances for slope stability and flooding/erosion to reduce the

damages caused by flooding, erosion, and other water related hazards, and to allow access for their maintenance and repair.

- Access standard, which means a method or procedure to ensure safe vehicular and pedestrian movement, and access for the maintenance and repair of protection works, during times of flooding, erosion and/or other water related hazards.

Farm retirement lot:

means one lot from a farm operation for a full time farmer of retirement age who is retiring from active working life, was farming on January 1, 1994 or an earlier date set out in an existing official plan, and has owned and operated the farm operation for a substantial number of years.

Fish:

means fish, shellfish, crustaceans, and marine animals, at all stages of their life cycles.

Fish habitat:

means the spawning grounds and nursery, rearing, food supply, and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

Flood fringe (for river and stream systems):

means the outer portion of the flood plain between the floodway and the flooding hazard limit. Depths and velocities of flooding are generally less severe in the flood fringe than those experienced in the floodway. The flood fringe is the area where development and site alteration may be permitted, subject to appropriate flood proofing to the flooding hazard elevation or another flooding hazard standard approved by the Ministry of Natural Resources.

Flood plain (for river and stream systems):

means the area, usually low lands adjoining a watercourse, which has been or may be subject to flooding hazards.

Flooding hazards:

means the inundation, under the conditions specified below, of areas adjacent to a shoreline or a river or stream system and not ordinarily covered by water:

- a. Along the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes, the flooding hazard limit is based on the 100 year flood level plus an allowance for wave up rush and other water related hazards.
- b. Along river and stream systems, the flooding hazard limit is the greater of:
 1. the flood resulting from the rainfall actually experienced during a major storm such as the Hurricane Hazel storm (1954) or the Timmins Storm (1961), transposed over a specific watershed and combined with the local conditions, where evidence suggests that the storm event could have potentially occurred over watersheds in the general area;
 2. the one hundred year flood; or
 3. a flood which is greater than 1) or 2) which was actually experienced in a particular watershed or portion thereof as a result of ice jams and which has been approved as the standard for that specific area by the Minister of Natural Resources.

except where the use of the one hundred year flood or actually experienced event as the standard for a specific watershed has been approved by the Minister of Natural Resources (where the past history of flooding supports the lowering of the standard).

Floodway (for river and stream systems):

means the portion of the flood plain where development (other than uses which by their nature must be located within the floodway, flood and/or erosion control works, or where appropriate, minor additions or passive, non- structural uses which do not affect flood flows) and site alteration would cause a danger to public health and safety or property damage. Where the one zone concept is applied, the floodway is the entire flood plain. Where the two zone concept is applied, the floodway is the inner portion of the flood plain, representing that area required for the safe passage of flood flow and/or that area where flood depths and/or velocities are considered to be such that they pose a potential threat to life and/or property damage. Where the two zone concept applies, the outer portion of the flood plain is called the flood fringe.

Great Lakes - St. Lawrence River System:

means the major water system consisting of Lakes Superior, Huron, St. Clair, Erie and Ontario and their connecting channels, and the St. Lawrence River within the boundaries of the Province of Ontario.

Hazardous lands:

means property or lands that could be unsafe for development due to naturally occurring processes. Along the shorelines of the Great Lakes - St. Lawrence River System, this means the land, including that covered by water, between the international boundary, where applicable, and the furthest landward limit of the flooding, erosion or dynamic beach hazard limits. Along the shorelines of large inland lakes, this means the land, including that covered by water, between a defined offshore distance or depth and the furthest landward limit of the flooding, erosion or dynamic beach hazard limits. Along river and stream systems, this means the land, including that covered by water, to the furthest landward limit of the flooding or erosion hazard limits.

Hazardous sites:

means property or lands that could be unsafe for development and site alteration due to naturally occurring hazards. These may include unstable soils (sensitive marine clays [leda], organic soils) or unstable bedrock (karst topography).

Hazardous substances:

means substances which, individually, or in combination with other substances, are normally considered to pose a danger to public health, safety and the environment. These substances generally include a wide array of materials that are toxic, ignitable, corrosive, reactive, radioactive or pathological.

Housing market area:

refers to an area, generally broader than a lower tier municipality, that has a high degree of social and economic interaction. In southern Ontario, the county or regional municipality will normally serve as the housing market area. Where a housing market area extends significantly beyond county or regional boundaries, it may include a combination of counties and/or regional municipalities.

Infrastructure:

means physical structures that form the foundation for development. Infrastructure includes: sewage and water works, waste management systems, electric power,

communications, transit and transportation corridors and facilities, and oil and gas pipelines and associated facilities.

Institutional uses:

means those uses, associated with hospitals, nursing homes, pre-school, school nurseries, day care and schools, where there is a threat to the safe evacuation of the sick, the elderly, the physically challenged or the young during an emergency as a result of flooding, failure of flood proofing measures or protection works, or erosion.

Large inland lakes:

means those water bodies having a surface area of equal to or greater than 100 square kilometres where there is not a measurable or predictable response to a single runoff event.

Mine hazards:

means any feature of a mine as defined under the Mining Act or any related disturbance of the ground that has not been rehabilitated.

Mineral aggregate:

means gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other material prescribed under the Aggregate Resources Act suitable for construction, industrial, manufacturing and maintenance purposes but does not include metallic ores, asbestos, graphite, kyanite, mica, nepheline syenite, salt, talc, wollastonite, mine tailings or other material prescribed under the Mining Act.

Mineral deposits:

means an unusually large or rich concentration of valuable minerals identified within a small part of the Earth's crust.

Mineral aggregate operation:

means:

- a. lands under license or permit, other than for a wayside pit or quarry, issued in accordance with the Aggregate Resources Act, or successors thereto;
- b. for lands not designated under the Aggregate Resources Act, established pits and quarries that are not in contravention of municipal zoning by-laws and including adjacent land under agreement with or owned by the operator, to permit continuation of the operation; and
- c. associated facilities used in extraction, transport, beneficiation, processing or recycling of mineral aggregate, or the production of secondary related products.

Mineral mining operation:

means mining operations and associated facilities, or, past producing mines with remaining mineral development potential that have not been permanently rehabilitated to another use.

Minerals:

means metallic minerals and non-metallic minerals as herein defined, but does not include mineral aggregates or petroleum resources.

Metallic minerals means those minerals from which metals (e.g. copper, nickel, gold) are derived.

Non-metallic minerals means those minerals that are of value for intrinsic properties of the minerals themselves and not as a source of metal. They are generally synonymous with industrial minerals (e.g. asbestos, graphite, kyanite, mica, nepheline syenite, salt, talc, and wollastonite).

Minimum distance separation formulae:

means formulae developed by the Province to separate uses so as to reduce incompatibility concerns about odour from livestock facilities.

Multi-modal transportation system:

means a transportation system which may include several forms of transportation such as automobiles, walking, truck, cycling, bus, rapid transit and rail.

Natural heritage features and areas:

means features and areas, such as significant wetlands, fish habitat, significant woodlands south and east of the Canadian Shield, significant valley lands south and east of the Canadian Shield, significant portions of the habitat of endangered and threatened species, significant wildlife habitat, and significant areas of natural and scientific interest, which are important for their environmental and social values as a legacy of the natural landscapes of an area.

Negative impacts:

means:

- a. in regard to fish habitat, the harmful alteration, disruption or destruction of fish habitat, except where it has been authorized under the Fisheries Act, using the guiding principle of no net loss of productive capacity.
- b. in regard to other natural heritage features and areas, the loss of the natural features or ecological functions for which an area is identified.

One hundred year flood (for river and stream systems):

means that flood, based on an analysis of precipitation, snow melt, or a combination thereof, having a return period of 100 years on average, or having a 1% chance of occurring or being exceeded in any given year.

One hundred year flood level:

means:

- for the shorelines of the Great Lakes, the peak instantaneous stillwater level, resulting from combinations of mean monthly lake levels and wind setups, which has a 1% chance of being equaled or exceeded in any given year.
- in the connecting channels (St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers), the peak instantaneous stillwater level which has a 1% chance of being equaled or exceeded in any given year.
- for large inland lakes, lake levels and wind setups that have a 1% chance of being equaled or exceeded in any given year, except that, where sufficient water level records do not exist, the one hundred year flood level is based on the highest known water level and wind setups.

Other water-related hazards:

means water-associated phenomena other than flooding and wave up rush which act on shorelines. This includes, but is not limited to ice, ice piling and ice jamming.

Petroleum resource operations:

means oil, gas and brine wells, and associated facilities, oil field brine disposal wells and associated facilities, and facilities for the underground storage of natural gas and other hydrocarbons.

Petroleum resources:

means oil, gas, and brine resources which have been identified through exploration and verified by preliminary drilling or other forms of investigation. This may include sites of former operations where resources are still present or former sites that may be converted to underground storage for natural gas or other hydrocarbons.

Portable asphalt plant:

means a facility:

- a. with equipment designed to heat and dry aggregate and to mix aggregate with bituminous asphalt to produce asphalt paving material, and includes stockpiling and storage of bulk materials used in the process;
- b. which is not of permanent construction, but which is to be dismantled at the completion of the construction project.

Prime agricultural area:

means an area where prime agricultural land predominates. Prime agricultural areas may also be identified through an alternative agricultural land evaluation system approved by the Province.

Prime agricultural land:

means land that includes specialty crop lands and/or Canada Land Inventory Classes 1, 2, and 3 soils, in this order of priority for protection.

Public service facilities:

means land, buildings and structures for the provision of public services, but does not include infrastructure.

Public services:

means programs and services provided or subsidized by a government or other public body. Examples include social assistance, recreation, police and fire protection, health and educational programs, and cultural services.

Quality and quantity (of water):

is measured by indicators such as minimum base flow, oxygen levels, suspended solids, temperature, bacteria, nutrients, hazardous contaminants, and hydrologic regime.

Reserve water and sewage plant capacity:

means design capacity in a centralized water and waste water treatment facility which is not yet committed to existing or approved development.

Residence surplus to a farming operation:

means one of two or more existing farm residences built prior to 1978 and surplus to the farm, or an existing farm residence that is rendered surplus as a result of farm consolidation (farm consolidation means the acquisition of additional farm parcels to be operated as one farm operation).

Residential infilling:

means the creation of a residential lot between two existing non-farm residences which are on separated lots of a similar size and which are situated on the same side of a road and are not more than 100 metres apart.

Residential intensification:

means the creation of new residential units or accommodation in existing buildings or on

previously developed, serviced land and includes infill, accessory apartments and rooming houses.

River and stream systems:

means all watercourses, rivers, streams, and small inland lakes or water bodies that have a measurable or predictable response to a single runoff event.

Rural areas:

means lands in the rural area which are not prime agricultural areas.

Secondary uses:

means uses secondary to the principal use of the property, including home occupations, home industries, and uses that produce value-added agricultural products from the farm operation on the property.

Sensitive land uses:

means buildings, amenity areas, or outdoor spaces where routine or normal activities occurring at reasonably expected times would experience one or more adverse effects from contaminant discharges generated by a nearby major facility. Sensitive land uses may be a part of the natural or built environment. Examples include: residences, day care centres, and educational and health facilities.

Sewage and water systems:

Full municipal sewage and water services:

means piped sewage and water services that are connected to a centralized water and waste water treatment facility.

Communal services:

means sewage works and sewage systems, and water works that provide for the distribution, collection or treatment of sewage or water but which:

- are not connected to full municipal sewage and water services;
- are for the common use of more than five residential units/lots; and
- are owned, operated, and managed by:
 - the municipality; or
 - another public body; or
 - a condominium corporation or single owner which has entered into an agreement with the municipality or public body, pursuant to Section 51 of the Planning Act, providing for municipal/public body assumption of the communal services in the event of default by the owner.

Individual on-site systems:

means individual autonomous water supply and sewage disposal systems, that are owned, operated and managed by the owner of the property upon which the system is located and which do not serve more than five residential units/lots.

Partial services:

means connection to one communal service or full municipal service where the other connection will be to an individual on-site system.

Significant:

means:

- in regard to wetlands and areas of natural and scientific interest, an area identified as provincially significant by the Ministry of Natural Resources using evaluation procedures established by the province, as amended from time to time.
- in regard to other features and areas in policy 2.3, ecologically important in terms of features, functions, representation or amount, and contributing to the quality and diversity of an identifiable geographic area or natural heritage system. Criteria for determining significance may be recommended by the Province, but municipal approaches that achieve the same objective may also be used.
- in regard to other matters, important in terms of amount, content, representation or effect.

Significant archaeological resources:

means the remains of any building, structure, activity, place or cultural feature, which because of the passage of time is on or below the surface of the land or water, and which has been identified and evaluated and determined to be significant to the understanding of the history of a people or place. The identification and evaluation of this resource is based upon an archaeological assessment.

Site alteration:

means activities, such as fill, grading and excavation, that would change the landform and natural vegetative characteristics of a site.

Special policy area:

means an area within a community that has historically existed in the flood plain and where site specific policies, approved by the Ministers of Natural Resources and Municipal Affairs and Housing, are intended to address the significant social and economic hardships to the community that would result from strict adherence to provincial policies concerning development.

Specialty crop land:

means areas where specialty crops such as tender fruits (peaches, cherries, plums), grapes, other fruit crops, vegetable crops, greenhouse crops, and crops from agriculturally developed organic soil lands are predominantly grown, usually resulting from:

- soils that have suitability to produce specialty crops, or lands that are subject to special climatic conditions, or a combination of both; and/or
- a combination of farmers skilled in the production of specialty crops, and of capital investment in related facilities and services to produce, store, or process specialty crops.

Threatened species:

means any native species that is at risk of becoming endangered through all or a portion of its Ontario range if the limiting factors are not reversed.

Valley lands:

means a natural area that occurs in a valley or other landform depression that has water flowing through or standing for some period of the year.

Waste management system:

means sites and facilities to accommodate solid waste from one or more municipalities and includes landfill sites, recycling facilities, transfer stations, processing sites and hazardous waste depots.

Wave up rush:

means the rush of water up onto a shoreline or structure following the breaking of a wave; the limit of wave up rush is the point of furthest landward rush of water onto the shoreline.

Wayside pits and quarries:

means a temporary pit or quarry opened and used by or for a public authority solely for the purpose of a particular project or contract of road construction and not located on the road right of way.

Wetlands:

means lands that are seasonally or permanently covered by shallow water, as well as lands where the water table is close to or at the surface. In either case the presence of abundant water has caused the formation of hydric soils and has favoured the dominance of either hydrophytic plants or water tolerant plants. The four major types of wetlands are swamps, marshes, bogs and fens.

Periodically soaked or wet lands being used for agricultural purposes which no longer exhibit wetland characteristics are not considered to be wetlands for the purposes of this definition.

Wildlife habitat:

means areas where plants, animals and other organisms live, and find adequate amounts of food, water, shelter and space needed to sustain their populations. Specific wildlife habitats of concern may include areas where species concentrate at a vulnerable point in their annual or life cycle; and areas which are important to migratory or non-migratory species.

Woodlands:

means treed areas that provide environmental and economic benefits such as erosion prevention, water retention, provision of habitat, recreation and the sustainable harvest of woodland products. Woodlands include treed areas, woodlots or forested areas and vary in their level of significance.

Part 6

Land Management

By Brad Peterson

September 2003

PART 6 - LAND MANAGEMENT

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LAND MANAGEMENT

Regardless of how a parcel of land is secured, your conservation organization must then turn its attention to managing the land. At a basic level, the land trust must ensure that the resources and capacity to manage land are firmly in place and remain so for as long as the property is held. For most land trusts this means long-term protection of native biodiversity, or the ecological processes that sustain biodiversity. For other land trusts or conservation organizations, it can mean protection of other land-based resources, such as agricultural land or built heritage.

This part of the manual provides a checklist of items for successful land management with emphasis on the protection of natural heritage. Examples of good land management carried out by other organizations are provided.

Throughout this chapter, the terms “land management,” “land stewardship” and “caring for the land” are used in common to mean managing land primarily for the long-term protection of indigenous biodiversity. More exactly, “management” refers to taking measures to protect areas from negative impacts and carrying out activities that manipulate the environment. While this can mean installing facilities such as trail systems, activities often focus on maintaining diversity through control of populations or eradicating non-native species such as common buckthorn or garlic mustard. Strictly speaking, “stewardship” refers to managing property on someone else’s behalf (NCC, 1998), which emphasizes the societal role of land trusts as organizations that help to protect land for future generations.

The obligations a conservation organization assumes in managing land include:

- collecting or generating baseline information on the property’s history and existing conditions, including its natural heritage;
- determining how the site will be managed, before land securement, and whether your organization can fulfill these needs;
- developing land management plans that meet the organization’s goals and pertain to the unique characteristics of the property;
- building strong partnerships with volunteer stewards who are given clear direction to realize the organization’s expectations and requirements;
- regular monitoring to ensure long-term protection of valued resources.

As is often the case, the group will need to develop its capacity to take on the responsibilities of managing land. Building capacity can involve any number of factors such as tapping into sources of funding, building a dedicated group of volunteers, and securing support within the local community to carry out your desired activities.

6.1 Basis of Land Management

This section covers considerations for land management, usually before land is secured, and why land management is necessary.

6.1.1 First Steps

Setting organizational goals or policies that support future land management, as well as conducting background studies, are critical first steps for future success.

Your organization's letters patent will include objects that set a concise purpose. These objects are essentially a formal statement of goals and objectives that reflect your particular focus to actively secure and manage land. For example, you might list your objects as:

- to preserve, protect, restore, and improve the natural resources and environment of a specific region;
- to acquire, maintain, and preserve lands of ecological, recreational, scenic, agricultural, or open-space interest;
- to encourage and foster an understanding and awareness of the natural resources and environment and their value in enhancing our quality of life;
- to promote and carry out scientific research and data collection on natural resources and the environment, and to distribute findings to the public.

Everyone in your organization should be familiar with your objects or goals, and know where to find them.

The Nature Conservancy of Canada uses statements such as “protecting areas of biodiversity for their intrinsic value and for the benefit of future generations by securing ecologically significant areas, places of special beauty and/or educational interest through purchase, donations, conservation agreements and other mechanisms.”

Your group may adopt policies that serve a similar purpose. Your policies provide a valuable framework within which the group makes decisions on land management and other opportunities as they arise.

Strategic plans or action plans are often developed early in the life of an organization. They indicate the need for conservation action, describe the resources in the geographic area of interest, and set priorities for future action. This document can indicate intentional land securement and management activities, such as:

- accepting donations of land;
- raising funds through various sources, including private donations or government funding programs, to purchase outstanding properties;
- holding conservation easements or other limited interests on natural lands;

- managing lands according to the trust’s objectives, which often involves volunteer participation;
- assisting private landowners with management activities;
- encouraging private land stewardship;
- working jointly with other conservation organizations on projects;
- advising or working with government agencies and municipalities; for example, in carrying out evaluations to identify priorities for land protection;
- promoting public awareness and knowledge of natural heritage and good land stewardship; for example, through environmental education programs or providing training and assistance to local organizations.

Both policies and strategic plans or actions plans of your organization often contain information on the how, what, why and where of securing and managing land.

Your organization’s structure will also reflect its land management activities. In addition to the executive and the board, there may be committees for budget and planning, fundraising, or land transaction. A stewardship committee may also be useful to oversee monitoring and management of lands owned or otherwise secured by the trust.

Sooner or later someone will ask why you are interested in managing land. This is probably best answered in reference to the objects in your letters patent. A commonly accepted answer is to protect indigenous biodiversity and the processes that sustain it, for the long term. Biodiversity draws on a large range of organisms. Such a multi-species system is better able to adapt, by forming new patterns, to its own internal evolution or to environmental shocks and changes (whether natural or anthropogenic) than one containing only a limited range of organisms. The occurrence of a rare species such wild lupine or loggerhead shrike; an unusual habitat type such as alvar, wetland or escarpment; or other significant feature often drives the project. Land is secured and managed to protect and perpetuate native ecosystems and for social-cultural benefits such as recreation, research, education, and personal values.

6.1.2 Linking Land Securement and Management

Your organization will usually have a choice to secure a property or not. There is no such choice for management. All land must be managed responsibly, even if all that is warranted is to visit the property three or four times a year, and do nothing else. Land management, however, is rarely that simple, and other active measures including maintenance and monitoring will likely be necessary. Initially, the decision whether to proceed with securing land will be based on many factors. As with many circumstances in life, some of these factors are in your control, others are less so. Among the many things to consider are:

- the goals and objectives of the organization, i.e., the type of land desired (wilderness, natural areas, cultural landscapes or built heritage);
- whether properties “happen” to become available, or are purposely chosen;

- the financial resources available to pay for start-up and carrying costs (survey, legal and land transfer tax, ongoing maintenance, property taxes, insurance, signage, etc.);
- the strength of the volunteer base, staff or experts needed to properly manage the property;
- overall community support for the project, and the level of support from partners;
- the quality and character of the land itself.

This last point can often be the deciding factor to secure a property or not. Property-management needs can require some creative structuring of your organization's abilities and resources.

For example, as a very young organization, the Lower Grand River Land Trust Foundation acquired the very large, diverse and significant Ruthvan Park estate on the Grand River. This land trust chose to adapt to the situation and accept a large property which required a level of staffing, financial support and partnerships normally reserved for larger and much longer-established conservation organizations. While it took time to adapt, significant partnerships were forged with Parks Canada and other supporting institutions. This land trust has been very successful in protecting Ruthvan Park and carrying out other initiatives in the lower Grand River basin.

In contrast, the FON Nature Reserves Committee visited a biologically and geologically outstanding potential reserve property. The committee quietly decided that while it was a very worthy site, the waterfall, rapids, glacial potholes and karst topography would present hazards to reserve visitors that were beyond the FON's abilities to mitigate. Future management was a consideration in evaluating the site for acquisition. The FON was in the position of considering several other properties at the same time, and chose to manage its time and resources appropriately.

Taking a reasonable risk and accepting a challenge is different from overstepping one's limits.

Table 1 below has been developed to help your organization assess a property according to its characteristics, and what is likely to be involved in its management. This can help you decide on the type of property you are willing to secure by putting in perspective potential management needs. This is intended as a guide only, since many properties have unique requirements.

A reminder here that an initial scoping or information-gathering exercise may be necessary to make an informed decision. This should certainly include a ground-truthing exercise, i.e., visiting the property and noting the significance of the feature(s) to be protected. You might also consider broadening this exercise into a "baseline study." In fact, a baseline document report may be necessary where conservation easements are being put in place. These reports provide a general description of the property upon securement, and often note the type, extent and condition of significant features as well as potential negative factors such as historic and current adjacent land use. The Ontario

Heritage Foundation has available a manual on writing a baseline document report for conservation easements. Baseline information can provide a good starting point for land management and future monitoring. Section 3.4.1 contains additional information on baseline studies.

Table 1 Types of Properties and Potential Land Management Needs

	less management need		greater management need	
	Type I Property	Type II Property	Type III Property	Type IV Property
	Property characteristic			
Property contains entire ecological site	X		X	
Property contains only portion of entire ecological site		X		X
Site of high ecological integrity, and is relatively stable and undisturbed	X	X		
Site with previous ecological integrity but is disturbed, complex in nature, or needs protection from human uses. Active restoration or management is required.			X	X
Ownership:	single	multiple owners	single	multiple owners
Relative public profile:	low	low	potentially high	potentially high
	Potential land management needs			
Level of management:	minimal	potentially minimal	potentially complex	potentially complex
Material or financial inputs required:	low	potentially low	potentially high	potentially high
Stewardship arrangements required:	informal	informal or formal	potentially formal	formal
Need for multiple partnerships:	low	potentially low	potentially high	high
Need for formal management plan:	will benefit from management plan	will greatly benefit from management plan	will greatly benefit from management plan	will likely require a management plan

The main criteria for minimal management and minimal input are a relatively stable and undisturbed site with low public profile. “Passive stewardship” is appropriate for Type I lands where active management may neither be necessary nor advisable. More active management together with expected higher costs and greater organizational structure are likely to be needed as one approaches Type IV lands. All this, of course, will be tempered by the number of properties your organization manages. A good land-management plan, however, will reflect the above circumstances and help you organize complex issues and opportunities effectively.

While the most common approach is to hold a parcel of land in its entirety for some time, situations may arise where other creative tools and techniques can be employed in order to protect and manage land. These include:

- disposing of lands to a suitable management agency such as a government parks or wildlife agency;
- acquiring and then reselling the land with restrictions (i.e., purchase and saleback, as with the McKinlay-McGinty House in West Flamborough);
- limited, i.e, creative development of land where instead of taking the standard level of profit, land is developed with its natural areas left alone.

These particular activities and other similar activities have in the past been practiced widely in the United States. The potential for these techniques to be used in the settled landscapes of southern Ontario and elsewhere in Canada continues to grow. For a complete discussion of creative tools and techniques for protecting land, see *Creative Conservation*, *Saving America’s Countryside* and *Islands of Green*.

Finally, as with all projects, it is critical to organize land management in a manner that is easy to follow and transferable to others. For example, a simple three-ring binder or multiple file folder containing all relevant documents could be organized for each property. The property binder or folder can contain:

- the land-management plan;
- copy of property survey;
- correspondence;
- expense forms;
- minutes of meetings;
- monitoring reports;
- field work reports;
- other valuable information such as photographs, field notes, copies of ANSI or ESA reports, CA documentation, municipal land-use and zoning designations, or other historic documentation, contact names and numbers, etc.

6.1.3 Partnerships

Before delving into the nuts and bolts of land-management plans, the issue of partnerships must be explored.

Ask yourself why you need partners. You may find two basic types: partnerships you form to secure land and those that carry out the trust's day-to-day activities. Land securement partners can exist at arm's-length and provide specific resources such as funding, goods or services. These partners are typically government or non-government agencies, foundations, community groups or individuals who are looking to help conservation organizations achieve a similar goal. Other similar partners may include corporations and businesses that simply agree with your approach and want to support your work. And, of course, somewhere in this list is the owner of the property in which you are interested.

Other "partners" are your volunteers, including board members, committee members or trust members, often from the local community, who work in task groups or as individuals. Everyone benefits from a sense of belonging and working in partnership with the organization. Self-recognition of abilities and limitations can have positive effects for the whole group. Assign duties that are agreeable with volunteers, rotate mundane tasks if necessary, and provide training that develops their skills.

By providing you with something useful, partners will normally expect something in return. Depending on the partner, this can vary from having to produce something, such as a property-management plan, to performing ongoing monitoring or perhaps simply mentioning their name in your newsletter. All partners must be thanked from time to time, through some form of acknowledgment that suits them. A periodic sense of accomplishment is very important. This allows you to move onto other things and maintain active interest.

Excellent communication between your organization and your partners, whoever they are, is essential in order to address any issues and achieve project goals in an effective and timely manner.

Land management has its own unique partnering opportunities. Funding partners will likely be needed for both land securement and land management. Other partners can provide input and advice on management plans. Land-management activities such as property cleanup and monitoring can be done with the same or another set of partners. For example, neighbours of the secured property can be purposely seconded as partners for the purposes of monitoring and surveillance. In these circumstances it is critical to stay on good terms with neighbours, but also to let them know what your purposes and needs are.

6.2 Land Management Standards and the ONTA Land Registry

The "Principles for the Care and Recognition of Protected Natural Areas" adopted by the Ontario Nature Trust Alliance sets minimum standards for the management of conservation lands. These standards provide a basis for good land stewardship and can be used in developing goals and priorities for land-management activities.

**.Principles for the Care and Recognition of Protected Natural Areas
Ontario Nature Trust Alliance, 1997**

- Lands will be managed primarily for nature conservation, in which the natural processes of growth, succession and species interaction are generally permitted to proceed without interference. Lands may also be managed for the maintenance of particular features of interest such as particular species or habitats. Deliberate management actions may be taken to sustain such features.
- Member groups will determine the activities they consider compatible with the features of the individual site and endeavour, over time, to document their conservation interests and activities with regard to the site.
- The management of individual lands will be based on an understanding of the particular character of each property and its role in the surrounding landscape. The most important considerations for the stewards of the site will be the natural features of the property and their long-term maintenance and enhancement.
- If lands are open to the public, member groups will ensure that any risks to visitors are minimized and lands are appropriately signed.
- Protected lands are part of local landscapes and member groups will involve neighbours and the local community in site planning and other land management activities.
- Lands will be directly owned or cared for by member groups. If members are stewards of lands for other owners, through agreements, leases, or conservation easements, nominations of the sites to the Alliance registry must have the concurrence of the owner.
- A property registered with the Alliance will normally include notice that the area is recognized as part of the Ontario Nature Trust Alliance Land Registry.

Land-saving organizations are strongly encouraged to become members of the Ontario Nature Trust Alliance and to register their conservation lands with the ONTA Land Registry. In order for lands to be included in the registry, groups must adopt the ONTA's principles for each of their properties and fill out the registration form provided upon request. The forms are then submitted to the ONTA Land Registry task group. Upon review and acceptance, recommendations are made to council to accept the property into the registry. The registry is used to calculate the total area and type of lands protected by various conservation organizations, and to provide future input on meeting conservation targets for the province.

The benefits of registering land can include:

- recognition of the member group at the ONTA annual meeting;
- offer of a sign for the property at a good price;
- receipt of a certificate to each group for registration of property(s);
- listing of the property in the ONTA directory;
- opportunity for the member group to mention its participation in the ONTA Land Registry in its literature, etc.;
- special funding may be available from time to time to cover some land-securement costs;
- learning from others, sharing ideas and accessing resources and help.

6.3 Land Management Plan

This section describes how to prepare a land management plan, the main working document for each of your land trust's properties. Management plans also serve a strong educational role, help reach consensus on making present and future property management decisions, and, of course, help the trust fulfill its organizational goals. At a minimum, the content of the land management plan can be a record of the planning process. Most management plans will contain some additional information. The information listed below is fairly comprehensive. Note that not all of this information need be included in a plan, but producing a well thought-out plan can do wonders when applying for funding and making presentations to other decision-makers.

When a property is secured some activities usually require immediate attention. These can include boundary definition, access control, or any number of other pressing management needs. These activities can be carried out promptly while a management plan is being prepared.

The process for developing management plans, appropriately called "the planning process," helps ensure plans are prepared in a logical, defensible fashion. The planning model presented here is based on the FON land management process. It is designed for use by local stewards and/or FON staff. An annotated version is available from the FON, which explains the process in more detail. A summary of the process is presented first, so you can become familiar with its basic steps before the typical content of a land management plan is reviewed in detail.

6.3.1 Planning Process

Step 1:

Gather and assess information in terms of impacts and threats.

All biological and physical information on the property is assembled and linkages to the surrounding landscape are identified. An area is protected because of features or overriding considerations such as the presence of an endangered species or the presence of a particularly representative or rare habitat. Step 1 ends with taking the available biophysical information and determining the property's most *significant features*. By identifying what is most significant you can best focus your management activities, prioritize and set goals. The flip side to this is mapping the areas most *sensitive to human impacts* and flagging actions to protect these sensitive areas. Significant and sensitive features may often be the same.

Step 2:

Set working goals and objectives.

A goal may be to maintain natural processes and habitats based on pre-European settlement conditions to preserve important habitats. Or, management may focus on protecting one species. Or, the site may be used primarily for environmental education to heighten awareness and protect the surrounding ecosystem. A clear purpose is essential.

Have clear goals and know your tools. Don't confuse conservation tools with goals. For example, community involvement is almost always essential but it should not be your main goal—your trust likely exists to protect a specific landscape, habitat or species. That is your goal. Working with the community is the tool you might use to accomplish that goal.

In Step 1, impacts and threats are identified. But after a goal or goals are set, the impacts and threats should be revisited. What might have been a problem before may be less of an issue after a goal is set. One FON reserve is periodically flooded, scouring out a fen. It was an major erosion concern. Once a plan was written it was found that this was a natural disturbance, and in fact an essential process.

Objectives are action-oriented to meet your goal. For example, an objective may be to carry out a prescribed burn of remnant tall grass prairie or to reforest part of a woodland block to create more interior forest habitat in time.

Step 3:

Determine strategies and actions.

How are you going to meet your objectives? Strategies or actions are devised and implemented on the ground. In the case of a prescribed burn, an appropriate strategy would involve contacting the MNR prescribed burn team, as well as the local fire department and neighbours, obtaining the required permits, scheduling the event, setting in place an emergency plan, and conducting the burn on the appropriate day using qualified personnel. In most cases, however, volunteers will carry out less dangerous but essential tasks such as monitoring or trail maintenance.

Step 4:

Monitor and report.

Lastly, how will you monitor your success in implementing actions and how will you monitor the ecological health of the property? In the first case you want to know if you've effectively met your objectives. You may find you can do more, or you've set yourself too much work. In the second case you are trying to determine the health of your property. By monitoring both you can judge how effective your actions are. It is important to keep records and to include the results of monitoring within the plan, or as a follow-up document. Monitoring is complete when the results are brought full circle into revising your working goals and objectives, and carrying out the next round of management activities based on previous work.

Keeping a good record of the planning process will be very helpful in developing a sound management plan.

6.3.2 Content of the Land Management Plan

The following sample content is a guide. Ideas for implementing the plan are also provided when appropriate.

Background:

This section describes the property and how it can fit within the overall scope of your trust's activities. This will cover:

- The name of the property, its location (lot and concession, township and county and/or UTM coordinates).
- A description of historic, current and proposed land use and any history of disturbance (such as agriculture, logging, aggregate extraction, dumping, flooding, fire or disease, etc.).
- Original surveyors' records can be a big help in knowing what was and possibly what could be again.
- Which management issues need to be addressed, such as the state of current knowledge, effectiveness of current management, use of the property by visitors, plant poaching, state of repair of fences, boardwalks, trails, parking, adequate signage or interpretive information, effect of surrounding land uses or infrastructure.
- You may also need to become familiar with the status of any legal agreements, liability insurance and other management costs for buildings, facilities, utilities, etc.
- A statement on possible future securement of adjacent land may be appropriate, notably when the ecological site extends beyond the existing property boundary.
- As a matter of protocol, special organizational needs for stewardship can be indicated, such as whom the custodian or land stewardship group is and what their responsibilities are, or will be.
- Additional information on the property might be reviewed at this point, but not necessarily included in the plan. This can include the deed, with description of the property boundary, historic surveys, location of any easements, flood and fill lines, local land-use zoning regulations and any recent Official Plan amendments, taxation, improvements and other human influences.

It is recommended that descriptions of biodiversity features use the classification system for habitat/vegetation associations indicated in the Ecological Land Classification System. Also indicate the conservation status (i.e., environmental designations) assigned to individual species. This information is available from the Ontario Natural Heritage Information Centre in Peterborough, Ontario.

Inventory and Analysis:

This is Step 1 of the planning process indicated above.

You will want to gather all previous studies such as botanical studies, wetland evaluations, etc., that have been prepared for the property. This might include ANSI or ESA studies, other casual records of significant features that warrant protection or management, and intangible sources of information such as anecdotal accounts by local experts or local residents with a long history in the area.

Particular emphasis should be given to:

- A detailed description of the ecological sites or features or species to be protected or managed. Are there areas of critical habitat and how well represented are they regionally or provincially?
- Current information on landform, soils, hydrology, plant/vegetation associations, or individual species of flora and fauna.
- A review and assessment of related ecological functions associated with the property, such as interior forest habitat, seasonal movement and concentrations of wildlife, soil fertility and erosion control, buffering of water quality, groundwater recharge or discharge, or ecological succession and habitat diversity within communities. These functions should be described in terms of their contribution within a regional natural heritage system, or what primary and secondary roles these functions play in a local and regional ecological context.
- Which influences such as fire, flooding or other natural disturbance are important to maintain the species present?
- An assessment of habitat linkages with the surrounding region. For example, a property may contain the wintering site for an amphibian but its nesting area may be off-site.
- It is also useful to determine the MNR Site Region the property is located in. This provides an overview of climatic, physiographic, soil and vegetation characteristics.

FON's management goals for the well-used Petrel Point Nature Reserve are:
Maintain processes essential to the preservation of habitats present in a state prior to residential development and mitigate process/actions that alter this state, while ensuring no species loss.
Foster an appreciation, understanding, and enjoyment of Howdenvale Bay Wetland's special features, the role of wetlands in Ontario, and its relation to greater conservation issues.
Foster an awareness of the FON.

Assessing this information in order to determine significance, ascertain impacts and threats, or constraints and opportunities for protection, set priorities and develop goals should be done with assistance from someone with a strong environmental background or expertise in land management.

Conservation objectives should be clearly stated so future monitoring can determine if the objectives are being achieved. For example, objectives focusing on conserving specific habitats will be tested by the presence and persistence of particular indicator species, or other environmental indicators.

Goals and Objectives:

This is Step 2 of the planning process.

Goals may be regarded as motherhood statements, but they must be focused and clear enough to help determine explicit action-oriented objectives. Goals for the property should meet your organization's goal, and dictate management objectives. Objectives are then carried forward to the next stage that stipulates appropriate strategies or activities. In some instances you may wish to precede your goals with statements of policy, philosophy or purpose, which hearken back to why your organization is protecting land in the first place. In addition to natural heritage, goals and objectives may also refer to social or cultural benefits such as education, research, demonstration, recreation or fostering personal values.

It may be impossible or undesirable to bring land back to pre-European conditions, particularly if the site or the surrounding environment has changed significantly. In any case, you might ask what type of ecosystem is present and is what is likely to arise. Is it possible to maintain a particular stage of community succession in order to retain a rare species? Accepting the status quo may be the best alternative—'if it ain't broke, don't fix it'. Conversely, admit if the reserve cannot be managed in the ideal state. Remember, goals are often worked *toward*, and being patient and thinking ahead can pay off in the long term.

As with goals, there is some idealism in setting objectives. When it becomes apparent that objectives are not obtainable, a compromise may be needed.

In an FON land management plan, the goal, objectives and actions may look something like these, taken from a plan for a rare and little-understood Jack pine and limestone barrens.

Goal: Preservation of present natural conditions emphasizing rarity of habitat, ecological community representation and species diversity.

Sample objective: Learn more about the Jack pine/pavement environment with an emphasis on determining the natural processes present.

Strategy/action: allow and encourage research on-site, actively seek researchers.

Sample objective: Seek to preserve linkages with the greater surrounding ecosystem.

Strategy/action: maintain a dialogue with adjacent national park; contact and inform adjacent landowners of activities on-site; consider purchase of key surrounding lands to secure linkages.

In the above Jack pine and limestone barren example, note that management activities do not manipulate the site in any way. A hands-off approach is very desirable for more pristine sites with a low public profile. More active management is likely necessary for disturbed sites or sites with visitor impacts.

Strategies and Actions:

This is Step 3 of the planning process.

Your action plan will indicate what activities will be accomplished by what time, and what budget may be required. Specific natural area restoration or management activities can be described, or at least referred to if they are performed by other experts.

For the most part, strategies and actions may be organized and carried out by a lead hand, or land manager, reserve steward, or custodian, with support from the board or a designated volunteer working group or stewardship committee made up of board and community members. Ideally, these people should also be involved in developing the management plan. It is critical to set expectations up front so all working members can assume their responsibilities in a meaningful way. The lead hand and helpers should be well informed, well trained, and well suited to the task. You may also need to indicate which natural disturbances should be allowed to continue in order to perpetuate rare species, etc.

Deciding what and when to manage can be tricky. The difference between natural and human disturbances can often, but not always, be a guide. For example, small, isolated events such as local windthrows may be part of natural disturbance patterns and part of natural processes. In other circumstances, for example rare-plant poaching or timber theft, decisive action is required. In times like this, vigilant neighbours or other local stewards may help to correct the situation.

Practicality can begin to win over idealism at this stage, but the intention is still to fully implement objectives. You can use the same wording as you did for the objectives, but they are interpreted in terms of action on the ground.

Monitoring and Reporting:

Step 4 of the planning process indicates that the group should monitor its own activities, the activities of other people, as well as the natural features of the site.

Policies and procedures for monitoring and reporting (what, when, why, how, who) can be put in place so that potential problems can be caught in a timely manner. The following is a list of common monitoring topics, which can be modified to suit your own needs.

Monitoring Topics

Land Trust Activities

The activities you carry out in order to implement the property land management plan.

Natural Disturbance

- Erosion and sedimentation
- Mass wasting
- Fire
- Flooding
- Wind through
- Heavy browsing by deer

Human Disturbance

- Camping or play forts
- Ditching and drainage
- Dumping
- Fence
- Fires
- Horseback riding
- Hunting and fishing
- Invasive species
- Logging or timber theft
- Motorized Vehicles
- Mountain bikes
- Plant harvesting or trampling
- Storage or land use encroachment
- Vandalism

Nature Reserve Areas

Ongoing field studies of the ecological site for assessment of representative biodiversity. These may be some of the same Trust activities first listed here. Other research or field studies that contribute to a greater understanding of the ecological site.

The extent, location and history of each topic recorded during monitoring should be recorded.

The Couchiching Conservancy monitors its properties for disturbances four times a year, or once a season. A stewardship team consisting of four or five people visits the property. If problems are observed they contact a board representative who then brings concerns to the board's attention.

Ongoing field studies that monitor the ecological site or feature, which resulted in land securement in the first place, should be conducted at the time of year when the feature(s) are readily observable. For example, a site known for its ladies' tresses orchids can be visited in late summer when the plants are most conspicuous. Additional studies are advisable at other times of year to determine the full extent of the site's biodiversity. These site visits might be performed less often than monitoring for disturbances, but at more specific times.

More sophisticated monitoring of natural heritage features may involve measuring environmental indicators. This program should be based on scientific and technical protocols of ecosystem monitoring. This type of monitoring and reporting may become

part of legal agreements where multiple partners are involved in land securement and management.

Plan Map:

A plan map of the property must be produced. Usually called the Management Plan on its own, it should be prepared at a known scale, to scale, and show:

- property boundary;
- north arrow;
- calibrated bar scale;
- title, for example, Windsor Woods Management Plan, location and date;
- who the proponent is, with an optional listing of partners and who prepared the drawing
- cultural features such as roads, trails, fences, view points, easements, service utilities, dams, conservation authority flood and fill lines, etc.
- natural features such as the specific areas you are protecting, forest and forest edges, meadows, old fields, wetlands, permanent or intermittent watercourses, ponds and other water features, rock outcrops, or individual features such as trees, erosion scars, steep slopes, stone piles, hedgerows, depressions or high points, etc.

Base information for plan drawings can be gleaned from a number of sources. Copies of Ontario Base Maps (OBMs) may be available from your local conservation authority or MNR office. Aerial photographs are available from the MNR Information Centre at 416-314-2000, or through private suppliers known to your conservation authority. County offices may also have more recent aerial photos. On occasion your conservation authority may provide simple photocopies of aerial photographs for a nominal fee. Aerial photographs are handy for observing existing or historic conditions, and are useful for determining property boundaries, or the area and changes in the composition of forests, wetlands and other open space over time.

Additional plan drawings may be necessary showing management units, buffer zones, land-use zones, etc., or details of smaller areas of the property to be managed such as various biotic associations within larger vegetation units.

Plan Review and Update

The land management plan should also indicate procedures for its own review and update. This is a two-tier process involving an annual review (a handy way of checking to see if action items have been completed *and* scheduling activities for the following year) and a five-year plan update (rewriting or updating appropriate sections of the plan). Updates may be required sooner if significant change occurs on or near the property. This could involve population declines in significant species, severe flooding or fire, sudden increase in invasive species, land expropriation or proposed major land development adjacent to the reserve.

Plan reviews and periodic updates are critical to reflect ongoing changes in the property itself, an evolving working knowledge of ecosystem management, as well as changes in our evolving social, economic or political environment.

Sources of Information

Finally, your plan should list sources of technical information, contact numbers, references, publications, web sites, etc. Miscellaneous information such as field notes, tax notices, expense forms, photographs, etc., can be included at the back of the plan or stored separately in a three-ring binder or multiple file folders for the property.

As noted previously, your plan need not contain all of the information listed above. At minimum it must document the planning process and contain a map of the property. Most land management plans only need to pertain to management issues or opportunities relevant to the property and the associated organization or its partners. It need not be a long document, but dynamic in nature, complete and concise.

Management plans will likely be necessary for complex properties with many partners. For example, the Nature Conservancy of Canada requires management plans as a condition for funding or other legal and administrative support. Even Type I properties indicated in Table 1 that require minimal management or passive stewardship will benefit from a simplified management plan.

6.3.3 Developing the Management Plan

The management plan should be sensitive to the local community, and involve local people who feel they have a stake in their community. This can be a good first step in realizing your objectives if, for example, vandalism is a problem. Local people will often ensure the project's success, particularly in the long term. Ironing out differences of opinion, such as use of the land for resource extraction, can be a delicate issue. Proceeding in a non-confrontational manner, visiting the site together and sharing information on the type and sensitivity of natural resources can instill mutual respect and result in a strong ally.

While a certain amount of give and take is expected, involvement in developing and implementing the management plan must be conditional on being consistent with the objectives or primary goals and policies of the organization as they pertain to the property. In most instances this will focus on the protection of natural heritage and the processes that sustain native biodiversity over time. For example, certain human access or resource extraction of any type such as logging must be strictly prohibited where the maintenance of natural conditions is warranted.

The conservation organization should guide the process for plan development, provide clear expectations and requirements, and promote timely completion. The organization must also then be responsible for implementing, reviewing and updating the plan.

6.4 Other Land-Management Issues and Opportunities

- ONTA Land Registry: see 6.2 above.

- **Adjacent Land Securement:**

This may be desirable where an ecological site extends beyond the boundaries of the secured property. If this is the case, discussion with the appropriate landowner(s) can begin early and in a manner that increases your likelihood of securing the adjacent property. Various legal options may be useful at this stage, such as donation, first right of refusal, reserved life estate, bargain sale or installment sale. These and other creative means to secure land are discussed in Part 2 of this manual and *in Creative Conservation and Islands of Green*.

- **Taxes:**

Currently, all land owned by land trusts should be included in the Conservation Land Tax Incentive Program (CLTIP), if not in categories 1-4, then in category 5, “other lands.” This means these properties should be exempt from municipal taxes. The Ministry of Natural Resources began a review of the other conservation lands category in the spring of 1998. Until this review is completed only properties which qualified for the program in 1997 or properties which qualify under one of the other conservation land categories receive the property tax exemption.

Notwithstanding the above, you should not be paying taxes on wetland currently registered in the CLTIP. If you have these lands, you should check with your property assessment office, and ask for a copy of the portion of the assessment map that indicates the area of your property pertaining to CLTIP tax exemption. Keep this copy in your records.

There may be a need or desire to include managed forests under the Managed Forest Tax Incentive Program (MFTIP) as a companion to the main land-management plan. The MFTIP is administered by MNR and the Ontario Forestry Association (OFA). While CLTIP tax exemption overrides managed forest tax exemption (which assesses forested land at the standard farm property rate), you may benefit from going through the managed forest process. This may be advantageous if the CLTIP “other land” designation remains held up for some time and you stand to benefit from the tax relief of having a managed forest. Also, you might simply use the MFTIP as a guide to forest management. Standardized forms are provided. Otherwise, you can include forest management as a component of your main land-management plan.

- **Fiscal Needs:**

Common costs associated with real estate are startup costs, fixed costs, and carrying costs. Applied to land management, startup costs can include title searches, survey fees, legal costs, other real estate costs, and costs of preparing the management plan. Fixed costs exist no matter what you do with the property, and include mortgage payments or equivalent, and taxes. Carrying costs are usually variable in nature, and include such things as land or building maintenance, services, monitoring and other activities associated with implementing the management plan. An accountant will help the land trust organize these costs into a suitable financial plan. Remember, buildings

can have substantial maintenance requirements, and may result in a higher property-tax assessment than if the land was vacant.

- **Risk Management:**

The membership standards of the Ontario Nature Trust Alliance refer specifically to liability and risk-management issues in the following numbered sections:

2. The Board of Directors or Trustees of each member group assumes legal responsibility and accountability for the affairs of their group, and manages their activities and risk responsibly and accountably.
8. Member groups shall consider the safety of visitors on lands they protect and ensure that all lands are appropriately insured.

The Ontario *Occupiers' Liability Act* imposes a positive duty on owners and occupiers of land to maintain a reasonably safe environment for visitors and other property users. As an owner and occupier of land, the land trust or conservation organization must have a risk-management program in place. Such a program is intended to identify and minimize the actual physical risks to visitors on the property, to document the measures taken to identify those hazards, and to provide insurance against those accidents that ultimately may not be prevented. This should be a formal policy including at least the following elements:

- a program of property inspection to inventory and identify hazards and to monitor use and problems on the property;
- formal reporting on the site inspections, recommendations for action, maintenance activities, accidents and liability claims if any;
- a program of risk mitigation through maintenance, repair and capital and program improvements; and
- property insurance.

The Ontario *Occupiers' Liability Act* also provides some relief to landowners and occupiers so that they will not be discouraged from permitting recreational use of their rural lands. Accordingly, the statute provides that recreational users of rural lands that have not paid an entrance fee are considered to have willingly assumed their own risk against normal hazards. However, out of an abundance of caution, the prudent landowner will manage the property according to a risk-management program as outlined above.

A more complete description of land-trust liability and risk-management issues is found in the Winter 1991, Vol. 10, No. 1 issue of *Exchange: Journal of the Land Trust Alliance*.

- **Boundary Marking:**

As a standard practice, the property boundary should be determined when the land is secured. It is then a simple matter of maintaining visual boundary cues. The use of visual markers such as permanent bars is recommended, but should be limited. In

addition, stones or logs may serve as temporary or semi permanent reminders of the property line. Small bits of flagging tape may be useful, but these bright-coloured markers should be used sparingly, if at all.

It is highly recommended to meet adjacent property owner(s) and review the property boundary together on-site. Any encroachment issues may be discussed and resolved at that time, or at some other mutual convenient time.

Red dots - ten centimeters or four inches in diameter - posted in visible locations no more than fifty feet apart at a minimum of four to five feet off the ground indicate “no trespassing” under the provincial *Trespass to Property Act*. Yellow dots indicate that certain uses are permitted on the property provided you first contact the landowner. Care should be taken not to confuse these markings with standard forestry symbols in which yellow dots indicate a tree to cut, blue dots indicate a tree to retain, white dots indicate trails, etc., and red dots indicate the property boundary.

- **Encroachment:**

This can be a delicate issue, particularly when the encroachment is historic or done by a land donor. Encroachment may range from cutting grass and the storage of wood or machinery to the placement of buildings and other semi-permanent structures. Reducing or limiting the encroachment, phasing out the activity, or permitting certain uses should always be worked out by mutual agreement between the parties concerned. Agreement can be secured with a simple handshake possibly followed up by a friendly letter of understanding, particularly when the activity does not negatively affect the natural heritage values for which the land was secured. This type of cooperation can build mutual respect to address issues of greater consequence. Remember that your neighbour is a potential volunteer who can keep an eye on your property. Spending time with the person by walking the land together, listening to his or her position, explaining your needs, and reaching a mutual agreement is time well spent.

- **Trail Development:**

Visitors can have the biggest impact on your land. Limit the amount of trail exposure to significant areas or species, especially if they are sensitive to disturbance or prone to other prohibited activities, such as poaching. Trails may need to be closed at certain times of year, for example during nesting season, and appropriate measures taken to educate visitors as to why this is necessary.

- **Technical Information (various topics from wildlife management to butternut canker):** First-hand information from local experts can be very valuable. A second or third opinion is advisable, especially when land managers are new to land-management practice. As noted above, land-management activities can have quite opposite effects from those intended, and nature is sometimes the best (and least expensive) manager of all. All land-management activities must be very carefully considered before action is taken. Follow up monitoring is imperative, and may call for additional management action.

Consult several experts until you are satisfied with the proposed course of human action, or appropriate lack thereof.

Your local conservation authority or MNR office may provide some first-hand technical advice. Additionally, the Landowner Resource Center (LRC) has available more than 40 Extension Notes and sells publications on various land-management and land-stewardship topics. Among others, one popular publication is *Greening the Land: Principles, Guidelines & Cases*, published by the Centre for Land and Water Stewardship at the University of Guelph. A complete listing of products is available by calling the LRC in Manotick at 888-571-INFO or 613-692-2390, or visiting www3.sympatico.ca/lrc.

6.5 References and Other Sources of Information

References

Land Management Policies, Bruce Trail Association, Various document dates.

Petrel Point Nature Reserve Annotated Management Plan, Graham Bryan, Federation of Ontario Naturalists, 1996.

Creative Conservation, Stewart Hilts and Ron Reid, Federation of Ontario Naturalists, 1993.

Island of Green, Stewart Hilts et. al, Ontario Heritage Foundation, 1986.

A New Framework for Management Planning and Monitoring, Nature Conservancy Canada, June 1998.

Saving America's Countryside, Stokes, et. al. John Hopkins University Press, 1989.

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

Sources of Information

Landowner Resource Centre. Web site: www3.sympatico.ca/lrc/.

Natural Heritage Information Centre. (705)755-2000 or 1-800-667-1940. Web site: www.mnr.gov.on.ca/MNR/nhic/nhic.html.

6.6 List of Appendices

See Appendices for the following sample agreements and report forms:

- 6A Nature Conservancy of Canada Standard Land Holding Agreement
- 6B Nature Conservancy of Canada Standard Custodianship Agreement
- 6C Nature Conservancy of Canada Property Monitoring Report Form

Appendix 6A

STANDARD LAND HOLDING AGREEMENT

AGREEMENT dated this _____ day of _____, 20_____.

BETWEEN:

THE NATURE CONSERVANCY OF CANADA

(hereinafter called the "Conservancy")

OF THE FIRST PART

- and -

(hereinafter called the "Landowner")

OF THE SECOND PART

WHEREAS:

- (a) the Conservancy is a not-for-profit corporation incorporated under the laws of Canada, the purposes and objects of which include the acquisition of natural areas for preservation;
- (b) the lands more particularly described in Schedule A hereto annexed (hereinafter called the "Lands") have been acquired by the Conservancy for such purposes and the Conservancy has paid or received as donated value the total amount of _____ (herein called the "Conservancy Contribution") for such acquisition;
- (c) the parties have agreed that the Landowner shall take title to and manage the Lands subject to the terms and conditions hereinafter set out.

WITNESSETH THAT in consideration of the premises, other good and valuable consideration, the Conservancy Contribution and the sum of \$2 now paid by each party to the other (the receipt whereof is hereby by each acknowledged) the parties hereby agree as follows:

1. The Landowner shall have title to the Lands so long as the Landowner uses the Lands for the purpose of maintaining, enhancing, restoring or creating habitat in order to retain the diversity, distribution, and abundance of wildlife, including plants and ecological communities, in Canada, subject to any management plan that may be prepared in regard to the Lands as set out in paragraph

2. The Landowner shall forthwith prepare a Management Plan for the Lands, for the approval of the Conservancy, which shall set out the manner in which each part of the Lands shall be managed, protected and monitored so as to conserve and enhance their ecological values. The Landowner and the Conservancy shall use their best efforts to reach agreement on the Management Plan and execute same as soon as reasonably possible and in any event within - year of the date hereof. The Management Plan and any amendments thereto as hereinafter set out shall at the option of the Conservancy be registered against the title to the Lands by the Landowner. The Landowner shall manage, protect and monitor the lands in accordance with the Management Plan subject to any amendments thereto as may be agreed upon by the parties from time to time, acting reasonably. Until such Management Plan is executed the Landowner shall maintain the Lands in their current state subject to any new management initiatives, control of access and erection of signs, fences or gates and the construction of buildings and other improvements which have received the prior written approval of the Conservancy.

3. The Conservancy and its agents may enter upon the lands from time to time and may conduct biological inspections and evaluations.

4. The Landowner may transfer all or any part of the Lands (in this paragraph and in paragraph 5 referred to as the Subject Lands) to a government agency or not-for-profit conservation corporation, or may mortgage the Subject Lands, in each case subject to the consent in writing of the Conservancy, such consent not to be unreasonably withheld, provided the transferee or mortgagee first enters into an agreement with the Conservancy satisfactory thereto covenanting to be bound by the provisions of this Agreement and requiring any future transferee, mortgagee, assignee or lessee to enter into a similar agreement with the Conservancy.

5. Should the Landowner desire to transfer the Subject Lands to a third party free and clear of this Agreement, or cease to use the Subject Lands as set out in this Agreement, the following shall take place:

(a) The Landowner shall give notice in writing to the Conservancy of such desire and the reasons therefor;

(b) Within sixty (60) days of the receipt by the Conservancy of such notice, the Conservancy shall by notice in writing to the Landowner require the Landowner to:

- (i) at the option of the Conservancy either transfer the Subject Lands to the Conservancy or enter into a conservation agreement in regard thereto with the Conservancy in form and substance satisfactory to the Conservancy acting reasonably and in either case for nominal consideration; or,
- (ii) pay to the Conservancy an amount which is the greater of (1) the Conservancy Contribution or (2) the said Conservancy Contribution times a fraction, the numerator of which is the market value of the Lands at the time of disposition and the denominator of which is the purchase price of the Lands of which the Conservancy Contribution formed a part thereof or the appraised value of \$_____. In either case (1) or (2), payment shall be prorated on an area basis if the Subject Lands are of a lesser area than the Lands.

Should the Conservancy not give notice under (b) within the said period, the Landowner may proceed as set out in its notice aforesaid and if it so proceeds the Subject Lands shall cease to be subject to this Agreement. If the Conservancy gives notice under (b) within the said period, the Landowner may not transfer the Subject Lands to a third party or change the use thereof unless and until the conservation agreement has been entered into under (i) or the payment has been made under (ii) as the case may be and the costs and matter set out below have been paid and completed. Thereafter the Subject Lands shall cease to be subject to this Agreement. If the Subject Lands are of a lesser area than the Lands, this Agreement shall continue to apply to the remaining Lands. The market value aforesaid shall be determined by an AACI-accredited appraisal or appraisals satisfactory to the parties, acting reasonably, and obtained and paid for by the Landowner. The Landowner shall at its cost provide the Conservancy with good title to the Subject Lands or the conservation agreement thereon under (i) and shall pay to the Conservancy all the Conservancy's reasonable out-of-pocket expenses and administrative costs arising by reason of aforesaid.

6. The Landowner shall use all reasonable efforts to have the contribution of the Conservancy in acquiring the Lands recognized in any publicity in regard thereto and in any signage that may identify the Lands from time to time. The Landowner shall use all reasonable efforts to provide the Conservancy with copies of brochures, tapes, videos and news releases in regard thereto.

7. The Landowner shall pay and discharge promptly as due, all realty taxes, mortgages, utility charges and all other federal, provincial or municipal rates, charges and amounts, the non-payment of which might give rise to a lien or charge against the Lands. The Landowner shall keep the Lands free and clear of any construction liens.

8. The Landowner shall indemnify and save harmless the Conservancy against all claims, charges, costs, actions, causes of action and demands whatsoever that may in any way arise from the purchase, ownership and management of the Lands hereunder and in regard to this Agreement. The Landowner shall, at its expense, carry public liability insurance in an amount of _____ and at the request of the Conservancy shall provide proof of such insurance and if required by the Conservancy such insurance shall include the Conservancy as a named insured.

9. The parties agree that this Agreement shall be registered in the Registry of Deeds office in _____, Province of _____.

10. This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the parties have executed this Agreement.

THE NATURE CONSERVANCY OF
CANADA

Per:

[THE LANDOWNER]

Per

Schedule A

attached to and forming part of the Agreement between

THE NATURE CONSERVANCY OF CANADA and _____

dated the _____ day of _____, 20__

The terms and conditions of this Agreement apply to the following lands, as described in
the _____ Land Titles Office:

Appendix 6B

STANDARD CUSTODIANSHIP AGREEMENT

THIS CUSTODIANSHIP AGREEMENT made this _____ day of _____, 20____

BETWEEN: THE NATURE CONSERVANCY OF CANADA

(hereinafter called "the Conservancy")

OF THE FIRST PART;

-and

(hereinafter called the "_____")

OF THE SECOND PART.

WHEREAS:

- (a) the Conservancy is the owner of lands and premises in the Township of _____ in the County of _____ in the Province of Ontario, as more particularly described in Appendix "A" hereto ("Property");
- (b) the Property was purchased for conservation purposes and for the protection of the biological diversity, special beauty and educational interest of the Property as part of the heritage of Ontario;
- (c) the parties are desirous that administer and manage the Property on behalf of the Conservancy for the benefit of the people of Ontario.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration the parties hereby covenant and agree as follows:

1. The term of this agreement shall be ninety-nine (99) years from the date hereof and thereafter for successive renewal terms of ninety-nine (99) years subject to earlier termination as hereinafter set out.

2. _____ shall develop, maintain, preserve, administer and supervise the Property for the benefit of the people of Ontario and subject to the approval of the Conservancy acting reasonably and without limiting the generality of the foregoing insofar as reasonably possible the Property shall be maintained in a natural state and the biological diversity thereof shall be preserved and any recreational use shall be subject to such maintenance and preservation.

3. The Conservancy grants to _____ the right to enter on the Property and use the same as reasonably required by the _____ to fulfill the obligations of the _____ hereunder.

4. _____ shall prepare in consultation with the Conservancy a Management Plan for the Property. Insofar as possible _____ and the Conservancy shall reach agreement on the Management Plan on or before _____. Such Management Plan shall be in writing and when completed shall be executed by both parties.
_____ shall manage the Property in accordance with the Management Plan subject to any amendments thereto as may be agreed upon by the parties from time to time, acting reasonably. Until the Management Plan has been executed _____ shall maintain the Property in its current state subject to any new management initiatives, control of access and erection of signs, fences or gates and the construction of buildings and other improvements which have received the prior written consent of the Conservancy.
5. All maintenance and repair costs, utility costs, and the cost of the construction and maintenance of buildings and other structures and improvements and all realty taxes shall be the obligation of and shall be paid for by _____ subject to written agreement otherwise by the parties.
6. All buildings, structures and other improvements shall be the property of _____ until the termination of this agreement for any reason and on such termination shall become the property of the Conservancy provided that the Conservancy on such termination may require _____ to remove any such buildings, structures and improvements in which event _____ shall restore the Property as much as possible to its prior state before such structures and improvements were erected.
7. _____ shall ensure that there is no disturbance of the peace which would cause a nuisance to users of the Property and surrounding areas. _____ shall be responsible for the repair and maintenance of all buildings, structures and improvements on the Property and shall keep the same in good order and condition.
8. _____ shall indemnify and save harmless the Conservancy, its trustees, officers, employees and agents from and against all claims, demands, losses, costs, damages, actions, suits and other proceedings by whoever may sustain, brought or prosecuted in any manner in regard to the use of the Property or by anything done or omitted to be done thereon subject only to anything arising from the negligence of the Conservancy and its trustees, officers, employees and agents.
9. _____ may not assign any of its obligations hereunder without the prior written consent of the Conservancy
10. Any revenue from the Property net of expenses shall be payable to the Conservancy and deposited by the Conservancy in a separate fund for the future benefit of the Property. Provided that if such monies exceed the anticipated cost associated with the Property as determined by the Conservancy, the Conservancy may apply the same to any of its other projects.

11. _____ covenants to ensure that if at any time there is any publicity concerning the project, then, in such publicity, the Conservancy and other organizations and agencies mutually deemed appropriate shall be mentioned and shall be given credit for its participation, it being understood that in any publicity (whether the same be signage or by print or electronic media), the reference to the Conservancy shall as to prominence and details be reasonably proportionate to the contribution made by it. _____ undertakes to provide written notice to the Conservancy of any proposed publicity.

12. _____ shall provide the Conservancy with an annual report of the property with such detail and information which the Conservancy may require acting reasonably and such report shall include the condition thereof, the activities thereon and revenue generated therefrom.

13. If either party should be in breach of the terms hereof the other party may give thirty (30) days written notice to such party to remedy such breach and if the same is not remedied within such period the party upon such notice may by notice in writing declare this agreement to be null and void as the date set out in such notice.

14. Any notice hereunder shall be sufficiently given if in writing and delivered or sent to the other party by first class mail or fax to the person and address set out in the files of the sender as advised by the other been received on the date of delivery, four (4) days after mailing, or the date of the fax, provided if such date of delivery is not a business day the date of delivery shall be deemed to be the next business day.

15. The parties shall execute such further assurances as may be required to give effect to this agreement.

16. This agreement shall ensure to the benefit of and be binding upon the parties hereto and their respective successors.

IN WITNESS WHEREOF the parties hereto have executed this Agreement

THE NATURE CONSERVANCY OF CANADA

Per: _____

Per: _____

Per: _____

Appendix 6C

PROPERTY MONITORING REPORT FORM

NATURAL LAND STEWARD'S REPORT (Type 1 Projects)

Project Name _____ Date of site visit _____
Name(s) of steward(s) _____
Club/Group/Association/Agency (if any) _____
Address _____
Telephone Number _____ Fax Number _____

DISTURBANCES

Natural disturbances:

Describe extent, if old or new, and note location on map.

- | | | |
|------------------------|--------------------------|-------|
| Beaver dams | <input type="checkbox"/> | _____ |
| Erosion | <input type="checkbox"/> | _____ |
| Fire | <input type="checkbox"/> | _____ |
| Flooding | <input type="checkbox"/> | _____ |
| Heavy browsing by deer | <input type="checkbox"/> | _____ |
| Siltation | <input type="checkbox"/> | _____ |
| Wind Falls | <input type="checkbox"/> | _____ |

Human disturbances:

Describe extent, if old or new, and note location on map.

- | | | |
|------------------------------|--------------------------|-------|
| Camping | <input type="checkbox"/> | _____ |
| Channelization of streams | <input type="checkbox"/> | _____ |
| Clearing of municipal drains | <input type="checkbox"/> | _____ |
| Ditching | <input type="checkbox"/> | _____ |
| Dumping (indicate type) | <input type="checkbox"/> | _____ |
| Feeding of wildlife | <input type="checkbox"/> | _____ |
| Fires | <input type="checkbox"/> | _____ |
| Herbicides | <input type="checkbox"/> | _____ |
| Horseback riding | <input type="checkbox"/> | _____ |
| Informal shelters (forts) | <input type="checkbox"/> | _____ |
| Introduced species | <input type="checkbox"/> | _____ |
| Litter (indicate type) | <input type="checkbox"/> | _____ |
| Logging | <input type="checkbox"/> | _____ |

- Mineral collection _____
 - Motorized vehicles _____
 - Mountain bikes _____
 - Pesticides _____
 - Pets _____
 - Plant harvesting _____
 - Poaching (fish/animal) _____
 - Road widening _____
 - Rock Climbing _____
 - Shoreline alteration _____
 - Stray animals _____
 - Timber theft _____
 - Trampling _____
 - Trapping _____
 - Trespass _____
 - Unauthorized construction _____
 - Urban runoff _____
 - Utility Corridors _____
 - Vandalism (signs/fences,
etc.) _____
 - Other (please describe) _____
-

HAZARDS

Please note any hazards on site and indicate location on map.

- Bears _____
- Rattlesnakes _____
- Poison Ivy _____
- Tree snags _____
- Old wells _____
- Other _____

TRAILS

Note any new trails, their condition and location on map.

- Formal trails (authorized) _____
- Informal trails
(unauthorized) _____

USES

Recreation Activities

Please note whether the following activities are occurring on site. Use a check in the box under “A” if the activity is allowed on site, or a check in the box under “P” if the activity is prohibited.

	A	P		A	P		A	P
Angling	<input type="checkbox"/>	<input type="checkbox"/>	Dog walking/training	<input type="checkbox"/>	<input type="checkbox"/>	Rock Climbing	<input type="checkbox"/>	<input type="checkbox"/>
Berry Picking	<input type="checkbox"/>	<input type="checkbox"/>	Equestrian use	<input type="checkbox"/>	<input type="checkbox"/>	Skating	<input type="checkbox"/>	<input type="checkbox"/>
Boating	<input type="checkbox"/>	<input type="checkbox"/>	Hiking	<input type="checkbox"/>	<input type="checkbox"/>	Snowmobiling	<input type="checkbox"/>	<input type="checkbox"/>
Bird watching	<input type="checkbox"/>	<input type="checkbox"/>	Hunting	<input type="checkbox"/>	<input type="checkbox"/>	Snowshoeing	<input type="checkbox"/>	<input type="checkbox"/>
Bus Tours	<input type="checkbox"/>	<input type="checkbox"/>	Motorized Vehicle use	<input type="checkbox"/>	<input type="checkbox"/>	Swimming	<input type="checkbox"/>	<input type="checkbox"/>
Camping	<input type="checkbox"/>	<input type="checkbox"/>	Nature appreciation	<input type="checkbox"/>	<input type="checkbox"/>	Trapping	<input type="checkbox"/>	<input type="checkbox"/>
Cross-country Skiing	<input type="checkbox"/>	<input type="checkbox"/>	Photography	<input type="checkbox"/>	<input type="checkbox"/>			
Cycling	<input type="checkbox"/>	<input type="checkbox"/>	Picnicking	<input type="checkbox"/>	<input type="checkbox"/>			
Other (describe)	<input type="checkbox"/>	<input type="checkbox"/>	_____					

Other Activities

Grazing	<input type="checkbox"/>	<input type="checkbox"/>	Educational program	<input type="checkbox"/>	-	Selective logging	<input type="checkbox"/>	<input type="checkbox"/>
Hay	<input type="checkbox"/>	<input type="checkbox"/>	Interpretive Program	<input type="checkbox"/>	-			
Other (describe)	<input type="checkbox"/>	<input type="checkbox"/>	_____					

FLORA AND FAUNA

Flora (please indicate any species not encountered in original inventory and any significant changes in the flora, particularly with respect to imperiled species. Attach list if necessary.)

Fauna (Please note any wildlife observed on site and any signs indicating the presence of wildlife. Attach list if necessary.)

**ACTION
REQUIRED**

- Fencing _____
- Garbage removal _____
- Re-vegetation _____
- Repairs _____
- Signage _____
- Other _____

RECOMMENDATIONS AND SUMMARY COMMENTS

Notes

