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Bradley C. Howard

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## CREATIVE CONSERVATION 101: AN INTRODUCTION TO LOCAL LAND TRUSTS

BRADLEY C. HOWARD\*

In January of 1990, the nation's premier land trust finalized a conservation transaction of monumental proportions. After purchase and the imposition of conservation easements, the Nature Conservancy accomplished the perpetual protection of 502 square miles of pristine wilderness in New Mexico.<sup>1</sup> This massive land transaction serves as an excellent example of a private organization employing available legal tools to achieve environmental protection for targeted properties. Successful conservation transactions involving large properties or highly sensitive areas promote the notion that particular places can be conserved in their natural state by organized public citizens. While the Nature Conservancy's use of considerable financial and organizational resources to pursue land conservation has generated attention,<sup>2</sup> it is clear that smaller, locally-focused land trusts are accomplishing a significant amount of land preservation.<sup>3</sup>

This article addresses the increasing popularity of local land trusts as a means of securing natural resources and protecting land. In particular, the article considers the legal issues and strategic concerns that confront individuals desiring to use a land trust to achieve their conservation goals. Treatment of this topic begins by discussing the legal assistance needed to form a local land trust. After considering the various issues that arise when seeking nonprofit corporate status for a land trust, the article focuses

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\* B.A. Catholic University, 1988, J.D. Marshall-Wythe School of Law, College of William and Mary, 1992.

1. John Barbour, *Nature Conservancy Buys Up Land To Ward Off Development*, L.A. TIMES, Feb. 25, 1990, at A6; See also Jake Page, *New Mexico's Gray Ranch: The Natural Preserve as Big as All Outdoors*, SMITHSONIAN, February 1992 at 30.

2. The Nature Conservancy enjoys the support of approximately 635,000 members and has as of March 1992 accomplished the protection of more than 5.5 million acres in the United States and Canada. The Conservancy also owns more than 1,300 nature preserves throughout the world (this constitutes the largest private system of nature sanctuaries in the world.) See *Membership and Financial Statement*, NATURE CONSERVANCY, Mar.-Apr. 1992 at 4.

3. As of September 1991, nearly 900 land trusts were functioning in 47 states. Locally-orientated land trusts have accomplished the protection of over 2 million acres in these 47 states. See LAND TRUST ALLIANCE, NATIONAL DIRECTORY OF CONSERVATION LAND TRUSTS, 1991; LAND TRUST ALLIANCE, THE LAND TRUST BROCHURE 1991.

on operational considerations such as liability and risk management, land protection strategies and ongoing tax concerns.

This article, however, touches only briefly on the intricacies of forming a nonprofit corporation, achieving tax-exempt status, and drafting land transaction contracts. Instead, this article attempts to provide a basic foundation for attorneys assisting in the creation of a land trust, an effective legal tool for land conservation.

### THE FORM AND FUNCTION OF LAND TRUSTS

A land trust<sup>4</sup> is a non-profit organization actively involved in the protection of land. The organization may be local, regional or national<sup>5</sup> and private, governmental or quasi-governmental.<sup>6</sup> All land trusts exist to protect identified values of specific properties. These values may be scenic, natural, agricultural, recreational, or historical. Land is targeted for protection depending on the particular value or combination of values that it possesses and the articulated focus of the individuals who act through the land trust. Some land trusts are created to protect specific properties,<sup>7</sup>

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4. Many land conservation organizations include the word "conservancy" rather than "trust" in their names. I have chosen to the word "trust" in this article because of its traditional use by conservation organizations and because the major national umbrella organizations (Land Trust Alliance and Trust for Public Land, for example) have incorporated "trust" in their titles.

5. For example, local land trusts in Virginia include the Historic Rivers Land Conservancy (focusing on the Historic Triangle of Virginia's Peninsula) and Rivanna Conservation Society (focusing on the natural areas surrounding Virginia's Rivanna River). Regional land trusts operating in Virginia include the Chesapeake Bay Foundation, the Piedmont Environmental Council and the Virginia Outdoors Foundation. Examples of national organizations are the Nature Conservancy and the American Farmland Trust. See VIRGINIA DEPARTMENT OF CONSERVATION AND HISTORIC RESOURCES, VIRGINIA'S HERITAGE: A PROPERTY OWNER'S GUIDE TO RESOURCE PROTECTION, 1988.

6. A majority of the nation's land trusts are privately organized and directed (meaning they are not associated with government entities). An example of a governmental land trust in Virginia is the Department of Conservation and Recreation, Division of Natural Heritage. This agency inventories state land and receives easements on sensitive property. The Virginia Outdoors Foundation is an example of a quasi-governmental organization. It was created by the Virginia General Assembly but acts as a public land conservation organization. *Id.*

7. For example, a coalition of musicians, authors and environmental activists established an organization called the Walden Woods Project in 1991 to protect the 2,680-acre tract of wilderness in Concord, Massachusetts where Henry David Thoreau dwelled and philosophized. See Chuck Philips, *Preserving An Age of Innocence*, L.A. TIMES, Oct.

while others exist to pursue generalized land protection strategies.

The use of land trusts as vehicles for conservation activities has increased dramatically in the last ten years. In 1982, approximately 400 land trusts existed in the United States with a collective membership of about 250,000 people.<sup>8</sup> By 1991, the number of land trusts had increased to 900 with a collective membership of almost 800,000 people.<sup>9</sup> One important indicator of a land trust's effectiveness is whether it maintains full time staff. In 1982, less than 50 land trusts employed full time staff.<sup>10</sup> By 1991, that number had grown to nearly 250.<sup>11</sup>

The increased popularity and effectiveness of land trusts can be attributed to several factors. One primary reason is publicity. In the last ten years, many highly visible areas of ecological and historical importance have been saved from development by well-publicized land trust actions. Portions of the Santa Monica Mountains,<sup>12</sup> the Colonial Point Forest in Michigan,<sup>13</sup> the Appalachian Trail in West Virginia<sup>14</sup> and the

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19, 1991 at F1.

8. Jean Hocker, *Opening Remarks: the State of the Land Trust Movement*, EXCHANGE (Land Trust Alliance, Washington, D.C.), Fall 1991, at 4.

9. *Id.*

10. *Id.*

11. *Id.*

12. The Santa Monica Mountains Conservancy (a state agency land trust) has acquired more than 17,000 acres of prime mountain land over the last 12 years and is constantly engaged in highly publicized deals and land transactions for the benefit of California's park system. This conservancy was recently negotiating with Bob Hope in order to acquire 10,000 acres of wilderness to be added to the park system. See Joseph T. Edmiston, *Striking Deals for Parkland*, L.A. TIMES, Oct. 15, 1991, at A1.

13. In 1985, a saw-mill operator bought this 283-acre forest that comprises the largest and least disturbed stand of red oak hardwoods in Michigan and possibly the entire Great Lakes region. The owner planned to harvest and export the wood to Germany, where it is prized for furniture. The Little Traverse Conservancy of Harbor Springs, Michigan, with assistance from the Nature Conservancy, worked with the owner and raised the necessary funds (\$1.25 million) to buy the land so that the owner received a profit and the citizens preserved the land. See Chris Elfring, *Preserving Land Through Local Land Trusts*, BIOSCIENCE, February, 1989, at 73-74.

14. The Trust for Appalachian Trail Lands was formed in 1982 to address the problem of Appalachian Trail despoliation. The trust has worked with government agencies to successfully protect nearly 11,000 acres along the 2,150 mile-long trail. William Poole, *In Land We Trust*, SIERRA, Mar.-Apr., 1992 at 52.

Rappahannock River area of Essex County, Virginia<sup>15</sup> have been protected by land trust actions that generated considerable attention in the affected communities. Successful land trust activities encourage conservation-minded individuals to form their own organizations to protect local areas.<sup>16</sup>

Another factor that has influenced the development of land trusts is the government's growing appreciation of the various tools used to preserve land.<sup>17</sup> Partnerships between land trusts and states have emerged to promote innovative state programs that fund or assist nonprofit land conservation projects.<sup>18</sup> States have also removed common law restrictions on the use of easements for conservation purposes by implementing legislation which permits less-than-fee interests in property

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15. Twenty-thousand acres of farmland in Essex County were protected in 1990 as part of the Nature Conservancy's Tidewater Rivers protection program in Virginia. The Nature Conservancy teamed up with the American Farmland Trust to locate a conservation investor, who purchased most of the marshland in the area and placed a conservation easement on it. See THE LAND TRUST ALLIANCE, NATIONAL RALLY '91 WORKBOOK 16 (Bound materials from the Land Trust Alliance National Rally held on September 21-25, 1991 in Waterville Valley, N.H.) [hereinafter WORKBOOK].

16. For example, successful conservation activities by regional organizations like the Chesapeake Bay Foundation and the Virginia Outdoors Foundation played a part in encouraging the formation of Virginia's first local land trust, the Historic Rivers Land Conservancy, in 1990. Interview with Carolyn Lowe, President of the Historic Rivers Land Conservancy, in Williamsburg, Virginia (Mar. 10, 1992).

17. Some land trusts have developed partnerships with local government to promote education about the use of particular land preservation tools. For example, The Compact of Cape Cod Conservation Trusts works with local governments on Cape Cod to promote the use of conservation easements for the protection of Cape Cod lands. See Mark H. Robinson, *Strategy For A Town Conservation Restriction Program*, in WORKBOOK, *supra* note 15, at 367.

18. For example, Iowa established the Iowa Resources Enhancement and Protection Fund to assist in the protection of state natural resources. See IOWA CODE ANN. §§ 455A.15 - 455A.19 (West 1990 & Supp. 1991). Another example is the Vermont Housing and Conservation Trust Fund, established in 1987 to promote the "dual goals of creating affordable housing for Vermonters, and conserving and protecting Vermont's agricultural land, historic properties, important natural areas and recreational lands . . . ." VT. STAT. ANN. tit. 10 §§ 301-325 (Supp. 1989). The Fund enables eligible land trusts to secure funds for conservation purposes. *Id.* § 321. On state conservation programs generally, see LAND TRUST ALLIANCE, *Crossing Over: New Directions in State Financing of Partnerships for Land Conservation* (forthcoming June 1992).

for conservation, historic or scenic purposes.<sup>19</sup>

Land trusts utilize a variety of tools to secure the preservation of land. A common, though often expensive, method is direct land acquisition with money obtained from membership dues, donations and fundraising activities.<sup>20</sup> Local land trusts that purchase valuable properties often transfer ownership to government agencies or national conservation organizations to avoid the expenses involved in major land management.<sup>21</sup>

Another approach to land preservation is limited development. Under this arrangement, the landowner sells a portion of the land for development while preserving the most sensitive or scenic areas.<sup>22</sup> The landowner realizes a profit, the developer enjoys the realization of plans and the land trust receives a conservation easement on the sensitive property.<sup>23</sup>

A conservation easement is a legal agreement between the owner of property and a nonprofit or governmental organization whereby the owner agrees to restrict future uses of the property.<sup>24</sup> Conservation easements are popular with landowners who want to protect the natural beauty of their land while retaining ownership. The conservation easement is a common and well-studied tool for land preservation.<sup>25</sup>

#### FORMATION OF A LAND TRUST

An attorney working with a land trust must be familiar with nonstock incorporation procedures, corporate formalities, board member liability and tax-exempt status requirements. A clear understanding of the purposes and functions of a land trust will also help an attorney advise community

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19. More than 40 states have enacted legislation that is specifically designed to immunize conservation easements from common law restrictions on alienability and enforceability. See Daniel C. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 824-25 (1990). For specific coverage of conservation easements in this article, see *infra* footnotes 124-134 and accompanying text.

20. Elfring, *supra* note 13, at 72.

21. *Id.*

22. *Id.*

23. *Id.* Limited development is also an effective strategy for avoiding major wealth depletion through federal estate taxes. See STEVEN J. SMALL, PRESERVING FAMILY LANDS 24 (1988).

24. LAND TRUST ALLIANCE, STARTING A LAND TRUST 84 (1990).

25. For a practical yet complete treatment of this land protection devise, see JANET DIEHL AND THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 6 (1988).

members who want to form a land trust but do not know where to begin.<sup>26</sup>

One fundamental question is whether the interested individuals actually need to form a land trust. If the individuals desire to protect land with only limited ecological, historical or scenic significance, forming a trust may not be worth the time and expense associated with incorporation and acquiring tax-exempt status.<sup>27</sup> If a land trust focuses on a few particular properties, members of the board and community may eventually lose interest in the project. Because of these concerns, in the case of a limited-focus group, a better approach may be to get a regional or national land protection organization involved in the project. As long as the project is compatible with the larger organization's purposes, a successful partnership can be arranged.<sup>28</sup>

Another consideration is the potential base for community support. Land trust organizers must confront the possibilities of duplicated efforts or inadequate wealth within the community. The existence of another land trust in the area or a dynamic governmental agency which successfully preserves similar lands will interfere with a new land trust's effectiveness.<sup>29</sup>

Forming a land trust as a legal entity involves four major activities: 1) drafting and filing articles of incorporation; 2) drafting and approving bylaws; 3) appointing directors and officers; and 4) obtaining tax-exempt status.<sup>30</sup> Although procedural requirements vary among different states, most state nonprofit corporation laws approach the establishment of a land trust in a similar fashion. The treatment that follows is intended as a general introduction to the topic, with specific emphasis on Virginia law.

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26. By the time most individuals seek legal assistance in the formation or functioning of a land trust, they have already organized to some degree. A well-informed attorney can direct them to resources that facilitate the development of an effective organization while still providing necessary legal assistance. For those individuals who want to preserve land in an organized fashion but do not know how to begin, they should be directed to national assistance organizations like the Land Trust Alliance in Washington D.C. or the Trust for Public Land in San Francisco and regional organizations like the Chesapeake Bay Foundation. Attorneys seeking current legal information relating to the advising of land trusts should contact the Land Conservation Law Institute, a joint program of the University of California, Hastings College of Law, and the Land Trust Alliance.

27. LAND TRUST ALLIANCE, *supra* note 24, at 12.

28. *Id.*

29. *Id.*

30. *Id.* at 15.

*Articles of Incorporation*

Land trusts usually are not trusts in a traditional legal sense, but instead are nonstock corporations formed for the purpose of conserving land. The corporate form provides flexibility and other advantages in comparison to a traditional trust arrangement.<sup>31</sup> Incorporation limits the liability of the officers, directors and members of the land trust while providing a collective sense of purpose and direction for everyone involved.<sup>32</sup> Incorporation also allows the organization to continue its activities even as particular individuals come and go.<sup>33</sup> Incorporation notifies the public that an organization is committed to its stated purposes. Consequently, banks, government agencies and businesses often prefer to deal with an incorporated land trust rather than a group of dedicated individuals.<sup>34</sup>

A land trust's articles of incorporation ("articles") can be viewed as "the basic constitution of that particular corporation."<sup>35</sup> The articles should comply with legal requirements but should not contain the detailed information that is more appropriate in an organization's bylaws.<sup>36</sup> State law determines the required content of an organization's articles of incorporation. Most states require that the articles include the name of the corporation, a statement of purpose, a statement of nonprofit status and minimal information about the incorporators or directors.<sup>37</sup> The Revised Model Nonprofit Corporation Act requires a statement of corporation name, a statement of status,<sup>38</sup> the name and address of each incorporator, the address of the corporate office, a statement as to whether the corporation will have members and a provision for the distribution of

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31. Suzanne C. Wilkins and Roger E. Koontz, *How to Form a Land Trust*, in LAND-  
SAVING ACTION: A WRITTEN SYMPOSIUM BY 29 EXPERTS ON PRIVATE LAND  
CONSERVATION IN THE 1980's 25 (Russell L. Brenneman & Sarah M. Bates eds. 1984)  
[hereinafter LAND-*SAVING ACTION*].

32. LAND TRUST ALLIANCE, *supra* note 24, at 27.

33. *Id.*

34. *Id.*

35. ROBERT H. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS 316 (1989).

36. LAND TRUST ALLIANCE, *supra* note 24, at 27.

37. Wilkins and Koontz, *supra* note 31, at 26

38. The articles must include one of the following statements: 1) this corporation is  
a public benefit corporation; 2) this corporation is a mutual benefit corporation; or 3) this  
corporation is a religious corporation. REVISED MODEL NONPROFIT CORPORATION ACT  
("RMNCA") § 2.02(a)(2) (1987).



assets on dissolution.<sup>39</sup> A statement of purpose is optional under the Model Act.<sup>40</sup>

For example, in Virginia land trusts and other nonprofit organizations are incorporated pursuant to the Virginia Nonstock Corporation Act.<sup>41</sup> This act requires that the articles include the name of the corporation, a provision explaining member rights or a statement that the corporation will have no members, a provision for electing directors if there will be no members, and the address of the corporation's initial registered office.<sup>42</sup> Statements regarding the corporation's purpose, the management or business of the corporation and the powers of the corporation are optional.<sup>43</sup>

State codes require articles of incorporation to include minimal information; but federal law requires additional information if the corporation seeks tax-exempt status.<sup>44</sup> Under federal law, the articles must include limitations of purpose consistent with the particular tax status sought, provisions for asset disposition upon dissolution and a statement limiting political activity.<sup>45</sup> Including the type of information that will help establish eligibility for tax-exempt status is essential.

Many states make a statement of purpose in the articles optional, but it is mandatory for those organizations seeking tax-exempt status. The Internal Revenue Service ("IRS") will scrutinize the purpose statement when determining eligibility for tax-exempt status.<sup>46</sup> Consequently, the statement should include language specifically directed toward meeting requirements for tax-exempt status.<sup>47</sup>

The purpose statement must address the type of activities that the trust

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39. RMNCA § 2.02 (1987).

40. *Id.*

41. VA. CODE ANN. §§ 13.1-801 - 13.1-944 (Michie 1989 and Supp. 1991). Citations to Virginia law are made for illustrative purposes. Other states' approaches may vary.

42. *Id.* § 13.1-819.

43. *Id.*

44. The process for securing this status is treated *infra* at notes 77-110 and accompanying text.

45. Wilkins and Koontz, *supra* note 31, at 26.

46. LAND TRUST ALLIANCE, *supra* note 24, at 28.

47. For example, the Articles of Incorporation for the Historic Rivers Land Trust in Virginia contains a Purpose Statement which includes as one provision the purpose "to operate as a charitable tax-exempt entity in a manner consistent with § 501(c)(3) of the Internal Revenue Code and its Regulations as they now exist or may be amended."

intends to pursue.<sup>48</sup> The drafter of this statement must recognize the tension between promoting flexibility and securing tax-exempt status. The purpose statement should include all possible charitable activities in which the trust may engage; but the statement must limit the activities to those allowed under section 501(c)(3) of the Internal Revenue Code.<sup>49</sup>

The Virginia Code and the Revised Model Nonprofit Act do not require that the articles include an explanation of the corporation's powers;<sup>50</sup> but such a provision is recommended for establishing tax-exempt status.<sup>51</sup> A powers provision describes how a land trust will accomplish its purposes, and the IRS will carefully examine this provision when ruling on tax-exempt status. Unless state law requires a specific list of powers,<sup>52</sup> an inclusive provision that describes the corporation's powers as those conferred upon nonprofit corporations by law is acceptable.<sup>53</sup> Land trusts, however, should specify the power to hold and manage land if this is something the trust may do.<sup>54</sup>

One or more persons may act as incorporators, and state statutes generally do not establish incorporator qualifications.<sup>55</sup> Major donors,

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48. One example of a short but effective purpose statement is this: "The preservation and protection of natural resources for the benefit of the general public." This statement establishes a charitable purpose for the land trust without unduly limiting its functions. See LAND TRUST ALLIANCE, *supra* note 24, at 28.

49. Wilkins and Koontz, *supra* note 31, at 26-27.

50. See VA. CODE ANN. § 13.1-819(B) (Michie 1989); RMNCA § 2.02(b)(3) (1987).

51. LAND TRUST ALLIANCE, *supra* note 24, at 28.

52. Virginia is not one of the states that requires powers to be listed specifically. Va. Code § 13.1-826 lists powers that every nonstock corporation is presumed to possess, unless the articles provide otherwise.

53. For example, an inclusive powers provision may be phrased like this:

The Corporation shall be authorized to have and to exercise to the extent necessary or desirable for the accomplishment of any of the foregoing purposes and objectives, and to the extent that they are not inconsistent with the charitable purposes of the Corporation, any and all powers conferred upon non-stock corporations by the [Virginia Nonstock Corporation Act].

See LAND TRUST ALLIANCE, *supra* note 24, at 28.

54. *Id.*

55. Virginia and the Revised Model Nonprofit Corporation Act do not specify a required number of incorporators, but rather allow "one or more persons" to act as incorporators by signing and filing the articles of incorporation. VA. CODE ANN. § 13.1-818 (Michie 1989); RMNCA § 2.02(c) (1987). Some states require a particular number, usually between one and four. See LAND TRUST ALLIANCE, *supra* note 24, at 28.

however, should avoid serving as incorporators, as they may adversely affect the land trust's consideration as a publicly-supported charity for tax-exempt purposes.<sup>56</sup>

Once the state agency responsible for regulating corporations receives appropriate fees and determines that the articles meet legal requirements, the agency will issue a certificate of incorporation.<sup>57</sup> The certificate serves as conclusive evidence that the incorporators have complied with the laws of incorporation.<sup>58</sup> Incorporators should request a certified copy of the incorporation certificate for the trust's files.<sup>59</sup>

The articles may identify persons to serve as initial directors of the trust, although this information is not required.<sup>60</sup> Once incorporation is accomplished, the initial directors must hold an organizational meeting at the call of a majority. If initial directors are not specified in the articles, the incorporators are similarly required to meet.<sup>61</sup>

### *Bylaws*

The corporation's bylaws constitute an agreement or contract between the corporation and its members to conduct the corporation's affairs. Until repealed, the bylaws exist as continuing rules for the governance of the corporation and its officers. Because of their importance as the corporation's operating manual, the bylaws must be drafted with particular care. Bylaws are not required to be filed with the state, but the IRS will

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56. LAND TRUST ALLIANCE, *supra* note 24, at 34-36. Federal law requires a public charitable land trust to receive a certain percentage (between 10 and 33 percent, depending on the presence of other indicators) of its support from members of the general public or the government. See I.R.C. § 509(a)(1) (1988). Land trusts primarily supported by one or two major donors may not meet the general public support requirements and can be classified as private operating foundations instead of public charities. The classification imposed on the trust affects the ability to receive conservation easements and dictates whether the trust is subject to an excise tax on investments. LAND TRUST ALLIANCE, *supra* note 24, at 34-36.

57. In Virginia, a fee of \$25, payable to the State Corporation Commission of Virginia, is required for effective filing of Articles of Incorporation. VA. CODE ANN. § 13.1-816(a) (Michie 1989).

58. *Id.* § 13.1-820.

59. Wilkins and Koontz, *supra* note 31, at 27. Virginia law requires that the Corporation Commission charge a dollar per page plus three dollars for affixing the certification seal to the certified copy. VA. CODE ANN. § 13.1-617 (Michie Supp. 1991).

60. VA. CODE ANN. § 13.819(B) (Michie 1989).

61. *Id.* § 13.1-822.

scrutinize them when considering tax-exempt status.<sup>62</sup>

States do not regulate the content of a corporation's bylaws; the bylaws may contain any provision that is not inconsistent with state law or the corporation's articles of incorporation.<sup>63</sup> Land trusts should include in their bylaws the type of provisions that any nonprofit organization would include. The bylaws should address member voting rights, classes of membership, organization of directors and officers, procedures for meetings, organization of committees, and financial concerns (such as insurance coverage, fiscal year dates and bank accounts).<sup>64</sup> The land trust may also include provisions that are more specific to the type of work that the trust will perform. For example, the bylaws may list the different methods of land preservation that the trust may employ over time.<sup>65</sup> A flexible listing of this type will prevent the need to amend the bylaws in the future.

### *Land Trust Directors*

Of the many steps that a dedicated group of preservationists must take to establish an effective land trust, the creation of a board of directors may be the most important.<sup>66</sup> The careful selection of board members is crucial because in most cases, these individuals *are* the land trust.<sup>67</sup> The board provides the vision and direction for land-saving actions and remains responsible for the trust's successes and failures. Maintaining individuals on the board who share a common enthusiasm and motivation for land preservation is essential for the continued success of the trust.<sup>68</sup>

Volunteer board members have legal and fiduciary responsibilities to the charitable nonprofit organization which they serve.<sup>69</sup> State laws regulate the fulfillment of these responsibilities in varying degrees.<sup>70</sup> Virginia and the RMNCA require directors to discharge duties in good

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62. LAND TRUST ALLIANCE, *supra* note 24, at 29.

63. VA. CODE ANN. § 13.1-823 (Michie 1989); *See also* RMNCA § 2.06(b) (1987).

64. Wilkins and Koontz, *supra* note 31, at 27. *See also* RMNCA, OFFICIAL COMMENT to § 2.06 (1987); MARILYN E. PHELAN, REPRESENTING THE NONPROFIT ORGANIZATION, 18-30 (1989) (sample bylaws for a nonprofit organization).

65. LAND TRUST ALLIANCE, *supra* note 24, at 29.

66. *Id.* at 15.

67. *Id.*

68. *Id.*

69. DIANE J. DUCA, NONPROFIT BOARDS: A PRACTICAL GUIDE TO ROLES, RESPONSIBILITIES, AND PERFORMANCE 1 (1986).

70. *Id.*

faith with the best interests of the organization in mind.<sup>71</sup> Directors generally meet their legal responsibilities by acting in an informed and reasonable manner while remaining loyal to the trust and its mission.<sup>72</sup>

Directors of nonprofit organizations have three duties to the charitable organizations that they serve: the duties of care, loyalty and obedience.<sup>73</sup> The duty of care relates to the performance of board functions and typically involves an objective standard of care.<sup>74</sup> The duty of loyalty requires board members to avoid conflicts of interest and to serve only the interests of the organization.<sup>75</sup> The duty of obedience requires the director to act in furtherance of the organization's purpose or mission.<sup>76</sup>

### *Tax-Exempt Status*

A land trust must establish and maintain tax-exempt status if it is to operate effectively as a land preservation organization.<sup>77</sup> Regardless of

71. VA. CODE ANN. § 13.1-870 (Michie 1989); RMNCA § 8.30(a) (1987).

72. LAND TRUST ALLIANCE, *supra* note 24, at 19. *See also* LAND TRUST EXCHANGE, STATEMENT OF LAND TRUST STANDARDS & PRACTICES 5 (1989) [hereinafter STANDARDS & PRACTICES]. The Comment to Standard #2 (Board Accountability) notes that:

Every board member or trustee is responsible for knowing what is going on in the organization. A board member who does not exercise reasonable oversight for the organization may be held liable for the organization's wrongdoing or errors of judgement, even if he or she had no involvement in the action. Anyone who cannot assume this responsibility should not be on the board, but could serve the land trust in some other way.

*Id.*

73. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 611-620 (1983). *See also* DANIEL L. KURTZ, BOARD LIABILITY 21-90 (1988).

74. RMNCA § 8.30(a)(2) requires a director to act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." *See generally* Daniel L. Kurtz, *The Duties and Liabilities of Officers and Directors, Including a Review of Indemnification and Insurance*, in NONPROFIT ORGANIZATIONS 1990: CURRENT ISSUES AND DEVELOPMENTS 433 (Daniel L. Kurtz & Jonathan A. Small eds., 1990) [hereinafter NONPROFIT ORGANIZATIONS].

75. *See* VA. CODE ANN. § 13.1-871 (Michie 1989) (Director conflicts of interests); RMNCA § 8.31 (1987) (Director conflict of interest).

76. The mission or purpose of the organization is expressed in the articles of incorporation and the bylaws. Kurtz, *supra* note 74, at 23. When determining an organization's purpose, a court may also look to the organization's actual activities. In the Matter of Multiple Sclerosis Service Organization of New York, Inc., 68 N.Y.2d 32, 496 N.E.2d 861.

77. Marion R. Fremont-Smith & Roger E. Koontz, *Becoming and Remaining a Tax-Exempt Organization*, in LAND-SAVING ACTION, *supra* note 31, at 29. The authors of this brief but comprehensive treatment of tax-exempt status provide an updated version of their

the land-saving strategies that the trust adopts, federal tax-exempt status is necessary to encourage donations from the public and to qualify the trust for special tax consideration under state law.<sup>78</sup> To obtain tax-exempt status, land trust organizers must perform several procedural tasks established by the IRS.<sup>79</sup> Most importantly, the land trust must restrict its operations to those allowable under the Internal Revenue Code.<sup>80</sup>

Land trusts can claim exemption from federal taxation by establishing that they are a public charitable organization,<sup>81</sup> a private operating foundation,<sup>82</sup> or a supporting organization.<sup>83</sup> The vast majority of land trusts in the United States qualify for exemption under the charitable organization category.<sup>84</sup> The IRS has ruled that the "acquiring and preserving [of] . . . ecologically significant undeveloped land" advances purposes that are "charitable."<sup>85</sup> The typical land trust includes in its articles or bylaws a declaration of public purpose so that the trust is more likely to qualify for charitable status under this ruling.<sup>86</sup> The IRS will consider whether the land trust is structured to effectuate the expressed public purpose or if instead it might be more likely to further private interests.<sup>87</sup>

A land trust is not automatically exempt from federal income tax, even if it clearly promotes charitable purposes and acts as a non-profit

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article in LAND TRUST ALLIANCE, *supra* note 24, at 31.

78. For example, federal tax exempt status allows a corporation to enjoy similar exempt status in Virginia. VA. CODE ANN. § 58.1-401(5) (Michie 1991).

79. IRS PUBLICATION 557, *Tax-Exempt Status for Your Organization*, provides general information about the procedural steps that must be accomplished to obtain tax-exempt status. These steps are briefly summarized in this article but are more extensively treated in Fremont-Smith & Koontz, *supra* note 77, at 29. See also LAND TRUST ALLIANCE, *supra* note 24, at 31.

80. Citations to the federal tax code in this article will be to the Internal Revenue Code ("I.R.C.") rather than the U.S. Code.

81. I.R.C. § 501(c)(3) (1988).

82. I.R.C. § 509(a)(4) (1988).

83. I.R.C. § 509(a)(3) (1988).

84. LAND TRUST ALLIANCE, *supra* note 25, at 33.

85. Rev. Rul. 76-204, 1976-1 C.B. The ruling notes that the environmental conservancy under scrutiny "is enhancing the accomplishment of the express national policy of conserving the nation's unique natural resources . . . and is benefiting the public in a manner that the law regards as charitable." *Id.* at 6.

86. LAND TRUST ALLIANCE, *supra* note 24, at 31.

87. *Id.*

organization.<sup>88</sup> The trust must file for tax-exemption and pay federal income taxes until it is granted tax-exempt status.<sup>89</sup> As soon as possible, the trust should file (in duplicate) I.R.S. Form 1023 at the IRS district director's office in which the trust's principal place of business is located.<sup>90</sup> One of the trust's principle officers must sign the application. An attorney or an authorized agent may act as signatory if a power of attorney is attached to the application.<sup>91</sup>

The land trust must include with its application copies of the articles of incorporation and the bylaws, a balance sheet, and a statement of receipts and expenditures.<sup>92</sup> If the trust submits an application as soon as it is formed, a proposed budget for two full accounting periods must be included.<sup>93</sup> The application must also include an employer identification number<sup>94</sup> and an application fee that ranges from \$150 to \$300.<sup>95</sup>

The basis upon which tax-exempt status is granted affects the extent to which donors can deduct gifts given to the trust. In order to perform as an effective organization, the trust must legally qualify for maximum donor deductions.<sup>96</sup> The IRS classifies the land trust according to the

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88. 6 Fed. Taxes (P-H) ¶5014.01 (1990). See also MARILYN E. PHELAN, NONPROFIT ENTERPRISES: LAW AND TAXATION, vol. 1, § 7.01 (1985 & Supp. 1991).

89. 6 Fed. Taxes (P-H) ¶5014.01 (1990). Once an organization obtains tax-exempt status, the effective date of exemption is considered the date the organization was formed. The trust may file a refund claim for the taxes that were paid during the period that exemption was pending. However, the trust must file for exemption within 15 months of the date of formation in order to receive retroactive tax-exempt treatment. *Id.* See also I.R.S. PUB. NO. 557.

90. LAND TRUST ALLIANCE, *supra* note 24, at 32. See also 6 Fed. Taxes (P-H) ¶5014.01; I.R.S. FORM 1023.

91. Land trusts can use I.R.S. FORM 2448: *Power of Attorney and Declaration of Representative* to establish the propriety of their non-officer signatory. This form should be sent if the trust intends to be represented in any fashion by an attorney or agent who is not a principle officer. LAND TRUST ALLIANCE, *supra* note 24, at 32.

92. *Id.*

93. *Id.*

94. The trust can obtain a number by attaching I.R.S. FORM SS-4: *Application for Employer Identification Number* to the application. The trust must have a number, even if it does not have any employees at the time of application.

95. The trust must use I.R.S. FORM 8718: *User Fee for Exempt Organization Determination Letter* to determine the proper fee. FORM 8718 should be attached to the application.

96. *Id.*

demonstrated or expected support given to the organization.<sup>97</sup> This classification determines the requirements for obtaining maximum donor deductions. The classifications are: 1) publicly supported charity;<sup>98</sup> 2) private operating foundation;<sup>99</sup> and 3) supporting organization.<sup>100</sup>

A land trust will be classified as a "publicly supported organization" if it can pass one of two tests.<sup>101</sup> The one-third support test requires the land trust to prove that it normally receives one-third of its support from the government and the general public.<sup>102</sup> The facts and circumstances test requires the land trust to show that 1) it receives at least ten percent of its support from the government and the general public and 2) it maintains a program for fund solicitation where support is sought from the public, the government or other charitable organizations.<sup>103</sup> If a charitable organization fails both of these tests, the organization is presumed to be a private foundation.<sup>104</sup>

A land trust that is classified as a private operating foundation can still operate effectively as an organization dedicated to the preservation of land.<sup>105</sup> Donations of cash and entire interests in land to operating foundations are deductible; but operating foundations are not entitled to

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97. See generally, I.R.C. § 509; Rochelle Korman, *Charitable Giving and Receiving: An Overview of Tax Considerations and Current Policy Issues*, in NONPROFIT ORGANIZATIONS, *supra* note 74, at 81; LAND TRUST ALLIANCE, *supra* note 24, at 33. In 1969, Congress responded to concerns about individual abuse and influence over charitable organizations by creating distinctions based on the amount of public support given to the charitable organization. See Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969); Stanley S. Weithorn, *Primer for Charitable Giving: Outright and in Trust*, C666 ALI-ABA 639 (Nov. 18, 1991).

98. See I.R.C. §§ 501(c)(3), 509(a)(2); Treas. Reg. § 1.509(a)-3(a)(1) and (4).

99. See I.R.C. §§ 501(c)(3), 509(a)(1); Treas. Reg. § 1.509(a)-2.

100. See I.R.C. §§ 501(c)(3), 509(a)(3); Treas. Reg. § 1.509(a)-4(b)-(e).

101. See Phelan, *supra* note 88, at §§ 9.08 - 9.10; LAND TRUST ALLIANCE, *supra* note 24, at 34. An organization establishes status as a public charity by meeting the requirements of a publicly supported organization that are presented in IRC § 107(b)(1)(A)(vi).

102. I.R.C. § 509(a)(2); Treas. Reg. § 1.509(a)-3(a)(1). The IRS considers an organization's aggregate support over the four years preceding the current taxable year when determining "normal" support. See 6 Fed. Taxes (P-H) ¶5069 (1990).

103. LAND TRUST ALLIANCE, *supra* note 24, at 34.

104. I.R.C. § 509(a) (1988).

105. *Id.*



maximum donor benefits for partial interests in land.<sup>106</sup> Operating foundations must comply with the restrictions applicable to all private foundations. These restrictions penalize self-interested behavior on the part of foundation officers or interference with the organization's charitable purposes.<sup>107</sup>

A supporting organization is a charitable organization that is operated exclusively for the benefit of another public charity or government agency.<sup>108</sup> The relationship of the supporting organization to the controlling or operating public charity is comparable to that of subsidiary to parent.<sup>109</sup> Supporting organizations can receive tax-deductible gifts of conservation easements.<sup>110</sup>

### OPERATING A LAND TRUST

Land trust organizers will usually only seek legal counsel to deal successfully with the problems arising from organization formation; but informed counsel can also be addressed to issues involving the ongoing operation of a land trust. These operational issues include land protection priorities, land-saving strategies, liability and risk management, and fundraising.

#### *Land Protection Priorities*

A land trust exists to protect land. The type of land targeted will depend on the values and purposes incorporated by the land trust members and articulated in the trust's organizing documents. A purpose statement identifying targeted types of land ensures that the trust is narrowly focused toward goals that the collective group can support. More importantly, a

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106. See generally, Barbara L. Kirschten & Carla A. Neeley, *Charitable Contributions: Income Tax Aspects*, 521 TAX MGMT. (BNA) (1991); Thomas L. Geer & Robert M. Spevack, *Private Foundations: Definition and Classification*, 296 TAX MGMT. (BNA) (1989).

107. Private foundations, their managers and sometimes major contributors are subject to penalty excise taxes if the IRS determines that these acts have occurred: 1) self-dealing; 2) failure to distribute income; 3) excessive holdings in a corporation or business; 4) investments which jeopardize the charitable purpose; and 5) certain improper expenditures. 6 Fed. Taxes (P-H) ¶5069.

108. I.R.C. § 509(a)(3) (1988).

109. William F. Quarrie, Mable E. Quarrie & Margaret K. Quarrie Charitable Fund v. Commissioner, 603 F.2d 1274 (7th Cir. 1979), 79-2 U.S.T.C. ¶9534.

110. LAND TRUST ALLIANCE, *supra* note 24, at 36.

purpose statement of this type serves as a guide to direct the trust's establishment of extensive, written criteria<sup>111</sup> for individual land protection projects.<sup>112</sup>

Written criteria for land protection enables the land trust to be prudently selective when choosing projects.<sup>113</sup> This is critical because the land trust is obligated to see that its protection program results in public benefits.<sup>114</sup> The existence of tax-exempt status creates a duty to comply with standards of public accountability.<sup>115</sup> Establishing comprehensive land protection criteria assures that the trust will apply land protection strategies in a manner that promotes the public good.<sup>116</sup>

The trust must be directed to adequate sources of information so that it can identify properties that meet its established criteria for preservation. A valuable source in Virginia is the Natural Heritage Technical Reports, prepared by the Department of Conservation and Recreation, which present

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111. Written criteria serves as a checklist for determining the importance of particular pieces of property and the appropriateness of extending trust resources to protect them. Criteria should cover factors like the size of the property, long-term costs, ecological significance of property in question, existing threat to property, proximity of property to other protected property and the likelihood of achieving perpetual protection. LAND TRUST ALLIANCE, *supra* note 24, at 78.

112. See generally, Russell L. Brenneman, *Criteria for Acquisition and Management*, in LAND-SAVING ACTION, *supra* note 31, at 35; Jennie Gerard, *Criteria for Agricultural Land Protection*, in LAND-SAVING ACTION, *supra* note 31, at 39; Benjamin R. Emory & Davis Hartwell, *Criteria for Scenic Areas Preservation*, in LAND-SAVING ACTION, *supra* note 31, at 41; Charles Matthei, *Criteria for Community Land Trusts*, in LAND-SAVING ACTION, *supra* note 31, at 44; Peter Stein, *Criteria for Urban Land Trusts*, in LAND-SAVING ACTION, *supra* note 31, at 48.

113. See STANDARDS & PRACTICES, *supra* note 72, at 11. Standard #9: *Selecting Projects* requires that "[a] land trust must be selective in choosing land-saving projects." Comments to Standard #9 note that:

many land protection projects are done under great time pressure; the tendency is to protect now, think later . . . . Yet unless the trust exercises care in reviewing its projects, it may find itself stuck with a property or easement that serves little public interest, or that is very costly to manage, or that doesn't really fit with the trust's purposes. The trust may also open itself to public criticism, credibility problems, and even legal problems.

*Id.*

114. DIEHL & BARRETT, *supra* note 25, at 11.

115. *Id.*

116. *Id.*

inventories of natural areas in various parts of the state.<sup>117</sup> These reports identify ecologically sensitive land, locate rare animal and plant species, and provide detailed maps of priority areas.

Land trusts can also obtain information for their land protection management program from title companies, county recording offices, county assessor offices, local planning agencies, professional appraisers, local real estate professionals, and county offices of the Federal Soil Conservation Service.<sup>118</sup>

### *Land-Saving Strategies*

A land trust can accomplish land preservation by using one or more land protection methods, and each method can be used in different ways. The main methods are obtaining fee-simple ownership and receiving a conservation easement. Other methods include securing temporary or nonbinding protection measures<sup>119</sup> and purchasing options or rights of first refusal.<sup>120</sup>

Obtaining complete ownership of an ecologically sensitive parcel of land allows the trust to control the land and manage its protection. Ownership enables the trust to regulate access to the land and to implement any necessary resource management programs without undue

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117. See, e.g. VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, DIVISION OF NATURAL HERITAGE, NATURAL AREAS INVENTORY OF THE LOWER PENINSULA OF VIRGINIA 1991. This report attempts to accomplish the inventory goals mandated in the Virginia Natural Area Preserves Act, VA. CODE ANN. §§ 10.1-209 - 10.1-217 (Michie 1989), to determine "the habitat of rare, threatened, or endangered species, rare or state significant natural communities or geologic sites, and similar features of scientific interest." VA. CODE ANN. § 10.1-209 (Michie 1989).

118. LAND TRUST ALLIANCE, *supra* note 24, at 80-81.

119. Temporary agreements are appropriate when permanent measures are not suitable for the landowner or the trust. Measures of this type include lease agreements (the trust gains temporary control of sensitive land), management agreements (the trust enters into an agreement with the landowner specifying terms of managing the parcel, which the owner controls), and registration programs (the trust maintains a voluntary registry of sensitive lands that landowners contribute to by notifying the trust of changed circumstances or plans to convey). LAND TRUST ALLIANCE, *supra* note 24, at 85-86.

120. See generally, PHILLIP M. HOOSE, BUILDING AN ARK: TOOLS FOR THE PRESERVATION OF NATURAL DIVERSITY THROUGH LAND PROTECTION 81-137 (1981); Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, in LAND-SAVING ACTION, *supra* note 31, at 85; LAND TRUST ALLIANCE, *supra* note 24, at 83-85.

interference.<sup>121</sup> Fee-simple ownership, however, requires the trust to address added liability concerns and to devote the resources necessary to monitor the status of the property. Fee-simple acquisition at fair market value is an expensive and impractical method for many smaller land trusts. Alternatives include acquiring the land through bargain sales and soliciting outright donation of property.<sup>122</sup> Bargain sales allow land owners to generate funds while enjoying partial tax benefits and securing protection for their land.<sup>123</sup> Outright donations will usually consist of partial interests in the land rather than fee-simple title. Landowners can secure income tax and estate tax savings by donating remainder interests of land with conservation values to a land trust.<sup>124</sup>

A conservation easement is a legal agreement between a landowner and a conservation organization in which the owner promises to restrict the type and amount of future development that may occur on the land.<sup>125</sup> Conservation easements that are donated in perpetuity and conform to IRS regulations allow the donor to enjoy federal income tax deductions.<sup>126</sup>

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121. LAND TRUST ALLIANCE, *supra* note 24, at 83; Richard W. Carbin, *Private Purchase and Limited Development as a Means of Achieving Land Conservation Goals*, in LAND-SAVING ACTION, *supra* note 31, at 131.

122. LAND TRUST ALLIANCE, *supra* note 24, at 82-88.

123. A bargain sale is a sale at less than fair market value where the difference between the fair market value and the sale price is treated as a charitable contribution for federal income tax purposes. The landowner realizes a taxable gain on the sale but enjoys a charitable deduction which will partially offset the gain. The IRS has promulgated special rules on allocating costs and gain between the sale and the gift. *See generally*, Kirschten & Neeley, *supra* note 105; Glenn F. Tiedt, *Easements and Artifacts; An Archaeological Investigation of the Internal Revenue Code*, in LAND-SAVING ACTION, *supra* note 31, at 194; *See also* I.R.C. § 1011(b) (1988).

124. SMALL, *supra* note 23, at 16. Small recommends that the conservation remainder should be coupled with a conservation easement to secure maximum protection for the land. *Id.* *See also* Russell K. Osgood & Roger E. Koontz, *A Summary of Forms and Tax Consequences of Land Acquisition by a Charity*, in LAND-SAVING ACTION, *supra* note 31, at 135.

125. DIEHL & BARRETT, *supra* note 25, at 5.

126. *See* I.R.C. §§ 170(f)(3)(B)(iii) and 170(h) (1988). The IRC allows a charitable contribution deduction for the value of a conservation easement that is granted in perpetuity to a "qualified organization . . . exclusively for conservation purposes." *Id.* The "conservation purposes" for which easement may be donated are these:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public;
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;

Calculation of the tax benefits requires an inquiry into the land's value and the easement's effects on that value.<sup>127</sup>

A majority of states have passed legislation that specifically allows the donation of less-than-fee interests in property for conservation purposes.<sup>128</sup> These states have confronted the limitations surrounding reliance on common law approaches to land protection by specifically allowing assignment and perpetual enforcement by the easement holder.<sup>129</sup> Several states, including Virginia, have adopted the Uniform Conservation Easement Act ("UCEA"),<sup>130</sup> which is an attempt to provide

- (iii) the preservation of open space (including farmland and forest land) where such preservation is -- (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated federal, state, or local governmental conservation policy -- and will yield a significant public benefit; or
- (iv) the preservation of an historically important land area or a certified historic structure."

I.R.C. § 170(h)(4) (1988). See also Treas. Reg. § 1.170A-14.

127. The valuation of conservation easements has been the subject of recent litigation and administrative consideration. See *Shapiro v. Commissioner of Internal Revenue Service*, T.C. Memo 1991-128; 61 T.C.M. (CCH) 2215 (Mar. 21, 1991) (the U.S. Tax Court upheld the valuation of a conservation easement which calculated the value of possible subdivision of landowner's property now precluded by the easement); *Elinor P. McLennan v. United States*, No. 129-87T (United States Claims Court) Doc. 91-8019 (the Claims Court allowed a deduction for the grant of a scenic easement); Priv. Ltr. Rul. 90-264-34 (Dec. 31, 1990) (contribution of an easement is a qualified conservation contribution). A comprehensive treatment of easement valuation is offered in LAND TRUST ALLIANCE & NATIONAL TRUST FOR HISTORIC PRESERVATION, *APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF HISTORIC PRESERVATION AND LAND CONSERVATION EASEMENTS* 2nd ed. 1989. See also, Burton S. Kliman, *The Use of Conservation Easements on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B. C. ENVTL. AFF. L. REV. 519 (1981).

128. Daniel C. Stockford, *supra* note 19, at 824.

129. Ellen Edge Katz, *Conserving the Nation's Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 368, 380-84 (1986).

130. Unif. Conservation Easement Act, 12 U.L.A. 63 (Supp. 1991) [hereinafter UCEA]. Twelve states and the District of Columbia have adopted the UCEA. See ALASKA STAT. §§ 34.17.010 - 34.17.060 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 33-271 - 33-276 (Supp. 1988); D.C. CODE ANN. §§ 45-2601 - 45-2605 (Supp. 1988); IDAHO CODE §§ 55-2101 - 55-2109 (1988); IND. CODE ANN. §§ 32-5-2.6-1 - 32-5-2.6-7 (Burns Supp. 1988); KY. REV. STAT. ANN. §§ 382.800 - 382.860 (Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN., tit. 33 §§ 476 - 479-B (1988); MINN. STAT. ANN. § 84C.01 - 84C.05 (West Supp. 1989); MISS. CODE ANN. §§ 89-19-1 - 89-19-15 (Supp. 1988); NEV. REV. STAT. §§ 111.390 - 111.440 (1986); TEX. NAT. RES. CODE ANN. §§ 183.001 - 183.005 (Supp. 1989); VA. CODE ANN. §§ 10.1-1009 - 10.1-1016 (Supp. 1988); WIS. STAT. ANN. § 700.40 (1988).

a uniform approach to fostering the creation and maintenance of non-possessory property interests for preservation purposes.<sup>131</sup> The drafters of the UCEA were primarily concerned with removing the common law impediments to preservation easements.<sup>132</sup> The UCEA provides that an easement exists in perpetuity unless otherwise indicated.<sup>133</sup> The Act also provides enforcement powers for the landowner, the easement holder, a third-party specified in the easement and a person authorized by other law.<sup>134</sup>

### *Liability and Risk Management*

A land trust is potentially liable in several ways. Injuries or harm to users of property owned or managed by the trust, injuries or harm to volunteers or employees of the trust, harm as a result of board action or inaction and financial costs incurred because of environmental cleanup can all generate trust liability.<sup>135</sup>

Land trusts can confront liability concerns by selectively embracing land preservation projects. A trust should assume responsibility for particular parcels only after careful evaluation of safety and environmental factors unique to the properties.<sup>136</sup> Familiarity with environmental laws like CERCLA<sup>137</sup> is also important.<sup>138</sup>

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131. Katz, *supra* note 129, at 385. See also, UCEA, *supra* note 130, at *Prefatory Note*.

132. Katz, *supra* note 129, at 392. One common law concept that was not properly addressed by the UCEA Commissioners is the doctrine of changed conditions, which allows a court to terminate a real covenant or equitable servitude when changed conditions around the burdened land frustrate the purpose of the restriction or create undue hardship for the owner. Vigorous application of the doctrine could result in weakening the durable nature of conservation easements. See Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L. J. 1187 (1989).

133. UCEA, *supra* note 130, at § 2(c).

134. *Id.* §§ 3a(1)-(4).

135. LAND TRUST ALLIANCE, *supra* note 24, at 47-48. See also Gail Secor, *Coping with Environmental Liability Risks in Land Trust Transactions*, The Back Forty (Land Conservation Law Inst.) Feb. 1991 at 1.

136. LAND TRUST ALLIANCE, *supra* note 24, at 48.

137. Comprehensive Environmental Response Compensation and Liability Act, 47 U.S.C. §§ 9601-15 (1988). CERCLA provides for five types of potentially responsible parties: 1) current or prior owners who held title to the land when toxic materials were released on the land; 2) current owners of the site, regardless of when the release took place; 3) operators who controlled the toxic waste at the site during the time of release; 4) generators of the waste; and 5) transporters who engaged in bringing the waste to the

Responsible risk management requires the procurement of liability insurance.<sup>139</sup> Land trusts can usually rely on a standard Commercial General Liability policy, which covers the trust, its officers and directors, members and volunteers from most claims from the general public.<sup>140</sup> A trust should supplement this type of policy with non-owned automobile liability coverage and property insurance to cover land trust assets.<sup>141</sup> In addition, a land trust with staff should secure worker's compensation insurance.<sup>142</sup>

### *Fundraising*

Fundraising is an important activity for a land trust.<sup>143</sup> Broad public support enables the trust to protect land effectively while maintaining its classification as "publicly supported" under federal tax laws.<sup>144</sup> Board members should become involved in activities like publicity and public education promotion, canvassing, special events, direct mail and phone-a-thons.<sup>145</sup> The trust's bylaws should indicate the degree to which board members are expected to get involved with fundraising; non-participants should not be elected to another term.<sup>146</sup>

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site. *Id.* at § 9601 (20)(A-B). Land trusts must be aware of their potential liability as a prior or current owner or even as generators if the trust arranges for disposal of toxic materials left on a site by previous owners. See Secor, *supra* note 135, at 2.

138. For a treatment of current developments in CERCLA liability, see Kerry Anne Doyle, *Payment of Environmental Cleanup Costs Under CERCLA: A Survey of the State of the Law in the Fourth Circuit*, 16 WM. & MARY J. ENVTL. L. 61 (1992).

139. See generally, Michael Pierce Singsen, *Charity Is No Defense: The Impact of the Insurance Crisis on Nonprofit Organizations and an Examination of Alternative Insurance Mechanisms*, 22 U.S.F. L. Rev. 599 (1988); Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987); David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. BRIDGEPORT L. REV. 63 (1989).

140. LAND TRUST ALLIANCE, *supra* note 24, at 49.

141. *Id.* at 49-50.

142. *Id.* at 50.

143. A comprehensive treatment of nonprofit fundraising law is presented in BRUCE R. HOPKINS, *THE LAW OF FUNDRAISING* (1991).

144. LAND TRUST ALLIANCE, *supra* note 24, at 74.

145. Sue Karant, *Fundraising From Individuals: Building Your Organization for Success*, in WORKBOOK, *supra* note 15, at 279.

146. LAND TRUST ALLIANCE, *supra* note 25, at 71.

Land trusts must conform with state charitable solicitation statutes.<sup>147</sup> In Virginia, a trust must register with the Commissioner of Agriculture and Consumer Services if it is going to solicit donations in the state.<sup>148</sup> The trust must pay a registration fee calculated on the basis of gross contributions from the previous year.<sup>149</sup> The trust must keep accurate financial records and file notifications of official collaboration with professional fund-raising counsel or professional solicitors.<sup>150</sup> However, there are no annual reporting requirements in Virginia for charitable organizations or professional fund-raisers.<sup>151</sup>

### CONCLUSION

Land trusts are effective tools for securing land protection. Dedicated individuals concerned about ecologically sensitive properties in their localities have created many such trusts. The commitment and enthusiasm of these individuals often translates into considerable effort directed towards organization formation before the group seeks legal counsel. The intricacies of nonprofit law and tax-exempt law require counsel to become proficient in certain subjects before advising a land trust. Potential trust liability and the implications of failing to secure tax-exempt status require informed legal assistance at the time of trust creation and continuing counsel throughout the trust's operation. The celebrated achievements of existing land trusts prove that well-advised organizations can secure environmental protection for sensitive land.

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147. See, e.g., VA. CODE ANN. §§ 57-48 to -69 (Michie 1986 & Supp. 1991) (Solicitation of Contributions). An evaluation of each state's charitable solicitation acts is presented in HOPKINS, *supra* note 143, at 57-251.

148. VA. CODE ANN. § 57-49 (Michie 1986).

149. *Id.*

150. *Id.* §§ 57-53, 57-54.

151. HOPKINS, *supra* note 143, at 227.