Recordkeeping Essentials for Land Trusts

Standards and Practices Curriculum

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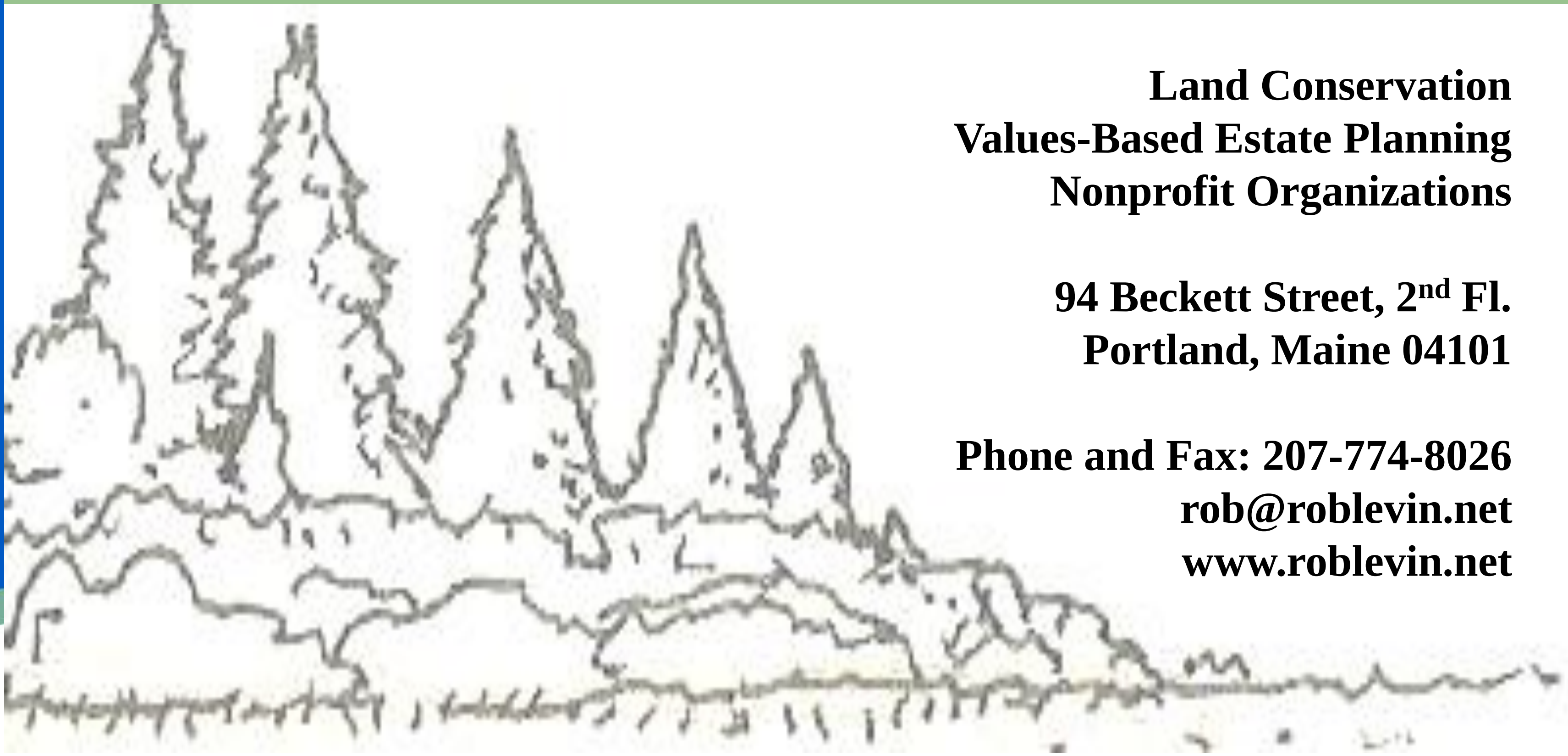

Land Conservation
Values-Based Estate Planning
Nonprofit Organizations

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What the course covers—
an overview of recordkeeping:

- What are records?
- Why maintain records?
- Legal basis for recordkeeping rules, including IRC § 170 (h).
- Litigation
- Recordkeeping policies
- State and Federal Nonprofit Laws

WHAT ARE RECORDS?

Records include:

- Paper—documents, memos reports, correspondence, all other paper.
- Photographs (and negatives or discs)
- Maps
- Computer files
- Email
- Voice mail

WHY MAINTAIN RECORDS?

Reasons to keep records:

- Organizational effectiveness and efficiency
- Legal requirements
- Protecting an organization’s interests in the event of investigation or litigation
- *Land Trust Standards and Practices*
- Land trusts = paper

LEGAL REQUIREMENTS FOR RECORDKEEPING

Sarbanes-Oxley Act of 2002:

An act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law, and for other purposes.

Purpose of the Act:

- Corporate accountability and responsibility
- Integrity of corporate financial records
- Transparency of corporate financial matters

… <u>for publicly traded companies and their auditors</u>

Applicability to nonprofits – What the legislation does not do:

- It does not change the basic laws of fiduciary duty that already apply to the boards and directors of non-profit corporations.
- It does not impose new legal standards of liability on directors or officers.
- It does not directly impose new record keeping requirements.

Applicability to nonprofits–
Specific provisions:

- Intentionally destroying records
- Whistle-blowing

Applicability to nonprofits – Other implications

- Increased scrutiny of the nonprofit sector -- Red Cross, The Nature Conservancy

- Increased state regulation of nonprofits

Areas of concern for nonprofits:

- Governance: It's all about oversight, independence, and accountability—particularly with respect to financial matters.

- Record-keeping: It's all about documentation, accuracy, transparency

IRS Requirements

- Tax-exemption records
- Employment, payroll and related filings
- Charitable donation records

State Law Requirements

- Annual corporate filings
- Charitable solicitation filings
- Lobbying filings
- Sales tax collection

Maine Nonprofit Corporation Act Requirements

- 13-B MRS Section 715 Requires
  - "Correct and complete books and records of accounts"
  - Minutes of all meetings of members, directors and all "committees having any of the authority of the board of directors"
  - Names and addresses of voting members
  - All such records open to inspection by directors and members for proper purposes

Donor Restrictions on Charitable Gifts

- Charitable solicitation rules: complying with the donor’s intent
- Accounting rules: unrestricted, temporarily restricted and permanently restricted gifts
- Records needed to track restrictions

Grants and Contracts

- Government grants and contracts
- Other contracts

LITIGATION:

What can you prove
and
what is the risk if you can't?

Evaluating the risk of litigation:

- Is your land trust concerned about litigation?
- LTA statistics 2003
  - 17,800 conservation easements nationally
  - Major violations requiring court action = 62 (>. 5%)

Evaluating the risk of litigation:

- What land trust data or records might some day be needed as evidence in court.
- The potential consequences to the land trust if the information is unavailable or inadmissible.
- The costs of maintaining those records or data.

Statute of Frauds

Some agreements must be in writing to be enforceable.

Rules of Evidence

- Personal knowledge
- Business records rule
- Public records
- Originals vs. duplicates
- Digital records

Statute of Limitations

- "Statutes of limitation" restrict the time available for bringing a lawsuit.
- Records are often kept only as long as they might be needed for litigation.

Maine Statute of Limitations

- General Rule – 6 Years (From date cause of action accrues)
- Contracts under seal – 20 years
- Surveyor malpractice – 4 years
- Attorney malpractice for title opinion – 20-year cap

IRS Statute of Limitations

- General Rule – 3 Years
- But exceptions for fraud or failure to file Form 990 – 6 Years

CONSERVATION EASEMENTS

§ 107(h) allows deduction for:

- Qualified real property interest to a
- Qualified conservation organization
- Exclusively for conservation purposes

A land trust should keep records to:

- Document conservation values.
- Document government conservation policies.
- Document public benefits.
- Document the land trust's ability to monitor and enforce the easement.

HOW?

- Conservation easement
- Baseline property report
- Project files

RECORDKEEPING POLICIES

Why create a recordkeeping policy?

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Records Policies

- "All organizations have a record retention policy. It is either a formal policy reviewed by lawyers or an informal one under which people destroy records when they are tired of looking at boxes piled to the ceiling."

  -- Jack Siegel, A Desktop Guide For Nonprofit Directors, Officers, and Advisors

Why create a recordkeeping policy?

- Opportunity to address risk
- Organizational consistency and continuity
- Efficiency
- New IRS Form 990 asks if organization has a “document retention and destruction policy.”
- Sarbanes-Oxley statute criminalizes destruction of certain records

Situational policy making:

- Not all land trust are the same
- Not all records are equal
- Building a system for growth
- Reviewing policies over time
- Keeping records on recordkeeping

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What issues should a land trust address in a records management policy?

Elements of a recordkeeping policy:

- Purpose or philosophy
- Document creation
- Document retention and storage
- Document destruction
- Recordkeeping responsibility

Creating a recordkeeping policy for Greenacres Land Trust

- Southeastern land trust, 10 years old
- Office in an old factory
- 3 staff, occasional volunteers
- 25 conservation easements
- 2 nature preserves
- 200 members/donors

What issues should your policy address?

Purpose or philosophy

- Identify the land trust’s primary concerns—litigation, efficiency, confidentiality, theft, access, etc.
- Address those concerns in the policy.

Document creation

- What are your key documents and records? Why?
- How much information is enough? How much is too much?
- What documents need to be signed and by whom?
- When do you need originals and when copies? How many copies are necessary?
- Who can sign documents for the land trust?
- When are paper files necessary? When are they useful? When should you keep electronic or digital records and files? When should you keep both?

Document retention and storage

- Who needs access to records—board, staff, volunteers, the public? Which records? How quickly? How often?
- Confidentiality: When should access be limited? How should access be limited?
- Safety and security: What are the risks of loss or destruction or unauthorized access and what are the consequences? Fire? Theft? Flood? Malicious mischief? Other? What can you do to limit the likelihood of loss?

- How will files or records be organized?
- How long should information be kept?
- Where will records be located?
- When should you archive? Why? What? Where? How?
- What will it cost to keep information, considering time, money and space?

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- When should computer files be backed-up? When should discs be created? Where should they be stored?

Document destruction

- What are the risks or costs of keeping documents forever vs. risks or costs of destroying documents?
- For how long is a land trust required to keep certain records? For how long might the records be useful?
- How often is the land trust likely to need the records?
- Are the land trust’s documents also kept by others? How easy would they be to get?

- How should records be destroyed? Shredding, recycling, the garbage?

Records Destruction

- Important: Destruction of records in the context of government investigations or lawsuits can violate federal and state law and court rules.
  - – Spoliation of evidence – Court can draw negative inference from destruction of key records
    - See Arthur Anderson v. U.S., 544 U.S. ___ (2005)

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Records Destruction

- Litigation Hold: Every records policy should include procedures to impose a "hold" on destruction of key documents when litigation or investigations are in process or pending.
  - Exception to regular retention schedule.

Recordkeeping responsibility

- Assign responsibility
- Keep records on record keeping (e.g., audits, destruction logs)
- Distribute policy to every employee
- Review annually w/ all employees

Recordkeeping responsibility

- MCHT – “File Day”

What records does your land trust need?

Greenacres Land Trust has just hired you as its new executive director. It is your second week on the job . . .

Personnel …

First, the land protection specialist has just left for a doctor's appointment after telling you she is expecting a baby in 7 months.

Land management . . .

Then your stewardship director calls. He is in the field with a volunteer crew removing buckthorn from a land trust preserve. A tree cut by a volunteer has just landed on a boundary fence.

The neighbor is furious.

Conservation easement stewardship …

- To end the day, a landowner calls: "Hi, I'm Joe Kingman and you have an easement on my land. I'm putting up a new barn on my property and I just wanted you to know.

- I don't know what the easement says but that nice land trust young man who visited last year told me it would be OK. Or maybe he said it would be OK if the old shed came down. I can't remember.

- I guess my neighbors aren't too happy though. They say the barn will block their view. They have an easement, too, and you told them they couldn't put up a barn. Oh, well.

. . . and the Board

Anyway, I'm sure the board won't care. When I was on the board when we took this easement, I'm sure the board said this sort of think would be fine.

And by the way, the contractor will start work tomorrow. Bye.

What a day! Now what do you do? What records do you hope the land trust has to help you know how to handle the issues that have come up and why?

LAND TRUST RECORDS

Organizational Records—The Business Side of a Land Trust

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Corporate records

- Articles of incorporation and any amendments
- By-laws (current and past)
- Membership lists, particularly for organizations with voting members
- 501(c)(3) status records—application, supporting documents, IRS determination letter
- State charitable reports

Board records

- Meeting notices and minutes
- Resolutions
- Lists of board members and officers (current and past)
- Delegations of authority to staff

Policies and procedures

- Board approved policies

- Staff implemented procedures

- Policy manuals

Financial records— Governing rules

- Generally accepted accounting principles (GAAP) and Financial Accounting Standards Board (FASB) rules.
- IRS rules for 501(c)(3) public charities.
- Government accounting rules for land trusts that accept government money.

Financial records:
Basic GAAP Principles:

- Historical cost principle
- Revenue recognition principle
- Matching principle
- Full disclosure principle.

Financial records: Fund accounting rules

- Tracking donor restrictions
- Tracking organizational fund uses (operating, stewardship, land acquisition, etc.)

Financial records: Functional expense allocation

- Program services
- Supporting activities =
  - – Management and general activities
  - – Fund-raising activities

Financial records: components

- General ledger—checkbook or database
- Chart of accounts
- Budgets
- Financial reports
- Audits
- Detail or documentation

Fundraising/donor records

- Always think about confidentiality
- Donor data and donor databases
- Donor gift acknowledgements
- Restricted gifts

Personnel records

- Resumes and job applications.
- Individual staff files (current and past) including job descriptions, performance reviews, salary information, time and leave records, benefits information, IRS required information (W-4, W-2, I-9.)
- Staff and volunteer files

Personnel records

- If you obtain a credit report for a prospective employee (or anyone else), both Maine Fair Credit Reporting Act (Tit. 10 MRS Ch. 210) and Federal Fair and Accurate Transactions Act of 2003 (15 USC 1681w(a)(1)) apply

Program records—everything else

- Administrative files
- Communications files
- Research and background files
- Anything a land trust needs to support its own program and analyze whether it is meeting mission

New Form 990

- Important!: Starting in 2009, there will be major changes on the Form 990.
- Many new questions about governance:
  - Conflict of interest practices
  - Board composition and decision-making
  - Whistleblower polices
  - Document retention policies

New Form 990

- Other new questions
  - Whether Board has reviewed 990 prior to filing.
  - First-class travel, housing allowances, bonuses, and other perks.
  - Occurrences of fraud or embezzlement.
  - Detailed information on gifts of goods and services.

New Form 990

- Read the new Form 990 and Instructions now, so your organization will be prepared by next year.
- Go to www.irs.gov/charities/article/0,,id=176613,00.html

New Form 990-N

- IMPORTANT: If below the $25,000 threshold for the Form 990 filing, starting in 2008, all 501(c)(3) organizations must file an Annual Statement that includes some basic information. Check www.irs.gov/charities/article/0,,id=169250,00.html for more information.

LAND TRUST RECORDS

Transactional Records—The Real Estate Side of a Land Trust

What information do you need—initial project data

- Analyzing projects—natural resource data, scenic resource data, maps, etc.
- Understanding local conservation policies or programs.
- Costs and financial implications.

What information do you need—CE stewardship

- Land protected with conservation easements will need to be monitored annually.
- Land ownership will change.
- Violations will occur--and will be corrected.
- Land management plans will be approved, later amended and approved again.

Keeping track of it all

- Overall filing system—potential, active and inactive projects
- Organizing files—county, township, name, number
- Identifying individual projects

Recordkeeping principles

- Working files
- Permanent files
- Safe storage
- Paper vs. digital data

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Contents of transactional project files

- Pre-closing files
- Final documents
- CE Stewardship
- Fee ownership files

Compilations, lists and databases

- Master project list
- Databases
- Measuring success: what data will you need?

New IRS Form 990 CE Questions

- The purpose(s) of conservation easements held by the organization
- Total number of conservation easements
- Total acreage subject to conservation easements
- Number of conservation easements on a certified historic structure, including those acquired after 8/17/06
- Number of conservation easements modified, transferred, released, or terminated by the organization during the taxable year (and explanation of changes)
- Number of states in which the organization held a conservation easement

New IRS Form 990 CE Questions

- Whether the organization has a written policy regarding the periodic monitoring, inspection, and enforcement of the conservation easements it holds (including summary of policy)
- Number of staff or volunteer hours devoted to monitoring or enforcing easements during the year
- Amount of expenses incurred in monitoring and enforcing easements during the year
- Whether each historic building easement acquired after 8/17/06 satisfies new requirements
- How the organization reports conservation easements in its revenue and expense statements, and balance sheet

Meeting the business records rule

- Have a records management policy
- Follow the policy

RECORDKEEPING PERSONNEL AND RESOURCES

- Role of the board and the executive director
- Assigning staff responsibility
- Using volunteers
- Outside help: auditors, librarians, information management companies

Maine Nonprofit Law

MANP *Guiding Principles and Practices*

- New publication by Maine Association of Nonprofits – An assessment tool for good governance and operational practices.
  - Visit www.nonprofitmaine.org/principles_practices.asp

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Short List of Maine Paperwork Requirements

- Articles of Incorporation
- Registered Agent
- Bylaws
- Charitable Solicitation Registration and Annual Fundraising Report
- State of Maine Annual Report

Maine Income Tax

- General Rule: 501(c)(3) corporations are exempt from paying Maine income tax.
  - Exception: Any federal Unrelated Business Income will also be subject to Maine income tax.

Maine Sales Tax

- As purchasers, land trusts do not qualify for Maine sales tax exemption, and must pay this tax just like any other individual or company.

Maine Sales Tax

- As sellers, land trust are not exempt from sales tax, unless they qualify as "Casual and Infrequent Sales."
- See Maine Revenue Services, Bulletin No. 9, Section 5 -- http://mainegov-images.informe.org/revenue/salesuse/Bull9_102907.pdf

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Employer Filing Requirements

- State and Federal Withholding
- Payroll Tax Forms
- State Unemployment Tax
- Workers Compensation Insurance
- Independent Contractor Form

Restrictions on 501(c)(3) Organizations

Campaigning and Lobbying Restrictions

- Campaigning – Just say no.
  - Any support for or opposition to federal, state, local candidates is strictly prohibited.
- For examples, see IRS Revenue Ruling 2007-41 - http://www.irs.gov/pub/irs-drop/rr-07-41.pdf

Campaigning and Lobbying Restrictions

- Lobbying
  - Limited lobbying is permitted.
  - Organizations that expect to do any serious lobbying should file IRS Form 5678. In general, this allows organization to spend up to 20% of budget on lobbying (for first $500,000 of budget).
  - If lobbying is expected to be a significant activity of organization, might need to file under 501(c)(4).

Substantiation Rules

- Overview -- Depending on the amount and the kind of gift, nonprofit corporations must meet various IRS substantiation requirements.
  - In addition to being an IRS requirement, substantiation makes for good business practice.
  - More information in IRS Publication 1771

Additional 501(c)(3) Rules

- Excess Benefit
  - Private Inurement
- Private Benefit

Excess Benefit Transactions

- The IRS monitors excess benefit transactions in order to ensure that 501(c)(3) nonprofit corporations are staying true to their mission by using all of their assets for charitable purposes and not private purposes.

Plain-Language Definition of Excess Benefit Transaction

- Any transaction between a 501(c)(3) organization and a director, officer, high-level employee, substantial donor, or anyone else who has substantial influence over the organization, where the value of the economic benefit provided by the organization exceeds the value of the consideration (including the performance of services) received for providing such benefit.

Examples of Excess Benefit Transactions

- “Unreasonable” Employee Compensation.
- Reimbursements Outside of “Accountable Plan”
- Holding Funds in Personal Accounts.
- Making Services Available on Preferential Basis.

Examples of Excess Benefit Transactions

- *Selling Property to Insider Below FMV*
- *Purchasing Property from Insider Above FMV*
- *Engaging in Any Transaction Resulting in a Substantial Diversion of its Income or Corpus*.

“Unreasonable” Compensation

- Includes monetary compensation and all benefits.
- Includes certain kinds of bonuses or non-fixed compensation.

What is “Unreasonable”?

- Comparables Analysis
  - Look for same size and type of entity (nonprofit or for-profit business) in similar geographic area. Should be similar duties.
  - MANP Salary Survey

Reimbursement of Expenses

- Reimbursements of expenses incurred by an employee or director, paid by an exempt organization, are not “excess benefits” if the expense reimbursements are made in compliance an “Accountable Plan.”
- Board should pass policy implementing “Accountable Plan.”

Accountable Plan

- Must include the following:
  - 1) Person must have paid or incurred deductible expenses while performing services as your employees,
  - 2) Person must adequately account to you for these expenses within a reasonable period of time (60 days), and
  - 3) Person must return any excess reimbursement or allowance within a reasonable period of time (120 days).

Private Benefit

- Similar to “excess benefit,” but not dealing with insiders.
- Not much IRS guidance in land trust arena.