

# Closing

## Finalizing Real Estate Transactions



*At closing, the transfer of the real estate interest, whether land or easement, is completed. This guide helps users organize and expedite the closing.*

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## Summary

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At closing, the parties to the sale or donation of land, easement or other property interest take the final actions necessary to complete the transaction and the property interest is conveyed to the buyer/donee. This guide, coupled with the [Model Checklist for Real Estate Transactions](#), helps users organize and expedite the closing of property transactions for conservation projects.

## Planning for Closing

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Preparation for closing begins in earnest upon completion of [due diligence](#). The instructions below provide a plan for the closing of the real estate transaction.

### Notice of Time and Place

Schedule a time and place for closing, checking to be sure that the project participants can accommodate the schedule. Send a confirmation notice not only to the landowners and their counsel but to all of the project participants and their counsel as well. The schedule may slip due to circumstances outside of the land trust's control but calendaring a closing date sets a tone of determination and urgency to get the deal done as expeditiously as possible.

### Checklist

Prepare a checklist listing the items needed to close the transaction; whose responsibility it is to furnish each item; the date that item needs to be circulated for review (if any); who needs to review and/or approve that item; and the date that review/approval must be completed in order to achieve a closing on the scheduled closing date.

### Model Checklist

The Pennsylvania Land Trust Association's [Model Checklist for Real Estate Transactions](#) serves as a tool:

- To keep track of pre-closing tasks and requirements as and when met.
- To check off deliveries at closing.
- To provide a system for organizing legal documents, reports and other items for ease of future reference and establishing a permanent record of the transaction.

Use the fourth column (status) of the checklist to keep track of the dates when an item needs to be received; circulated for review (if any); who needs to review and/or approve that item; and the date that review/approval must be completed in order to achieve a closing on the scheduled closing date.

### Tailor Checklist

The [Model Checklist for Real Estate Transactions](#) provides a starting place but organizations must, for each project, build a customized checklist to address the circumstances particular to the transaction. Review the following items in building a checklist to assure that all prerequisites to closing a particular transaction are included in the checklist.

- **Purchase (or donation) agreement.** Review the purchase agreement to determine any documentation or other items that need to be addressed and set dates for delivery, review and approval. If the acquisition is, in whole or in part, a donation, review the donation agreement to be sure that all requirements are listed on the checklist.
- **Grant requirements.** Review grant contract(s) to determine any grantor requirements and approvals that must be satisfied at or prior to closing.

- **County and municipal requirements.** List any notices that must be given, or approvals obtained, before closing may occur; for example:
  - Thirty days' notice to the county taxing authority must be given of a transfer of property subject to Pennsylvania Act 319 ([Clean and Green](#)).
  - Applicable subdivision ordinance requirements if the parcel to be purchased will be subdivided from a larger parcel prior to closing. (Update the checklist when municipal approval is obtained to include the conditions of the municipal approval.)
  - Check with the codes enforcement officer whether a transfer of ownership triggers any inspection or other requirements that must be met; for example, issuance of a certificate of no violations, a pre-transfer inspection for code violations, or issuance of a transfer of ownership certificate of occupancy.
- **Title commitment.** Review Schedule B-1 of the title commitment provided by the title insurance company to see if there are any other items required to be delivered by either seller/donor or buyer/donee.

## Pre-Closing

At least a week before closing, begin final preparations for closing by reviewing the checklist, updating the status of each item, and motivating those who have not delivered, reviewed or approved items to do so without delay.

### Board Resolutions and Other Buyer Items

Check to be sure the board approval covers the final terms of the transaction; furnish the corporate resolutions, good standing certificates, articles and by-laws to the title company and, if applicable, other project participants as soon as available. See the guide [Authorization of Real Estate Transactions: Rules and Processes for Nonprofits](#) for more information regarding corporate resolutions.

### Last Look at Documents

Circulate final forms of documents (with all exhibits attached) to all project participants for a last look before closing, requesting written confirmation of approval by e-mail. Keep track of the approvals on the checklist.

### Conditions of Approval

If the real estate transaction involves subdivision, make arrangements with the engineer to produce the requisite number of recordable plans for signing by landowners and government officials. Prepare and circulate for final approval by the municipal solicitor any deeds of dedication

of rights-of-way or other items listed by the municipality as conditions of approval. These documents, together with the subdivision plan, may be recorded prior to closing or, if landowners want to defer implementing the subdivision until the transaction has closed, they may be delivered to the title company to hold and record following the closing.

### Final Notice of Closing

Notify (or remind) the project participants and the title company of the precise date, time and location for closing. Request confirmation whether document signers will attend the closing in person and, if not, what arrangements have been made for signing and document delivery.

### Arrangements for Delivery of Funds

Work with the settlement agent to prepare buyer's side of the settlement sheet as accurately as possible so that buyer has a good estimate of the amount required to complete closing. Arrange for delivery of funds (bank check or wire transfer) to the account of settlement agent either the day before or on the morning of closing.

## Money Items

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Money is a key concern of all closings even for the transfer of a wholly donated property. This section of the guide explains the mechanics of how funds are handled at and prior to closing.

### Settlement Agent

There are dishonest people in this world. Some handle money at or prior to real estate closings. Taking precaution is prudent.

### Escrow Arrangements

Be sure to have an escrow agreement with anyone who holds funds needed to complete closing or to satisfy post-closing obligations; for example:

- The earnest money deposited by buyer with a real estate agent or title company at the time the purchase agreement is signed.
- Funds withheld from the purchase price payable to seller at closing to secure performance by seller of a post-closing obligation; for example, an obligation to clean up debris or to satisfy an outstanding lien.

Insist that the funds be held in a separate account under the buyer's tax identification number -- not commingled with other funds of the escrow holder. Furnish the escrow holder with IRS form [W-9](#) to assure that the deposit will be

held in a segregated account under the buyer's tax identification number.

Standard form agreements are often used for earnest money deposits; however, escrow arrangements securing post-closing obligations must be carefully tailored to achieve the desired outcome. Enlist the aid of counsel prior to closing if it appears that seller may not be in full compliance with the purchase agreement as of the scheduled closing date.

### **Protection Letter**

The company issuing the title policy (such as Commonwealth Land Title, Fidelity National, Chicago Title, Stewart Guaranty and others) is referred to as the "underwriter". Sometimes employees of the underwriter handle closings but, often, title commitments are issued and closings are held by agents for the underwriter.

If funds deposited prior to or at closing will be handled by an agent for the underwriter, (as contrasted with the underwriter itself), then request a *protection letter*. This is a form letter (issued routinely without charge by underwriters upon request), which furnishes assurance that if the agent, or employee of the agent, misappropriates funds or otherwise handles closing inappropriately, the underwriter (and the assets and reputation of the underwriter) will assume responsibility for the acts, or misacts, of its agent. Absent a protection letter, if the agent takes the money that was deposited and closes up shop, the depositor may only have a claim against the now-defunct agency.

### **Between Seller and Buyer**

Adjustments to the purchase price and reimbursements by buyer to seller for a portion of the property taxes paid for the year are recorded on the first (front) page of the [settlement sheet](#) (HUD-1 Settlement Statement). The settlement agent will ordinarily provide a draft settlement sheet prior to closing so that calculations can be checked prior to closing.

### **Purchase Price**

#### *Adjustments*

Depending on the terms of the purchase agreement, the purchase price may be subject to change. The guide [Purchase and Sale Agreements](#) describes a number of ways the purchase price may be adjusted prior to closing based upon survey and appraisal information as well as project funding requirements.

#### *Credit for Deposit*

When calculating the funds needed to complete closing, be sure to reduce the sum by the deposit (and any interest or earnings thereon).

### **Real Property Taxes (county, township and school district)**

#### *Apportionment as to Tax Cycle*

When the transaction is a transfer of ownership, the buyer typically reimburses the sellers for prepaid taxes allocable to the period from the closing date through the end of the then-current tax cycle.

*Example:* County and township taxes are assessed on a calendar year basis. If seller has paid the tax for the entire calendar year, the buyer reimburses the seller a sum equal to the daily tax rate times the remaining number of days in the year following the closing date. The daily tax rate is calculated by taking the taxes paid (usually on a flat rate without discount or penalty) and dividing by 365.

#### *Apportionment as to Acreage*

When the property conveyed has been subdivided from a larger parcel, taxes need to be allocated between the property and the remainder before the proration is calculated as described above. If the assessment furnishes a land-only value (and the property conveyed to the buyer is land only), that value may often be used to divide the tax proportionate to the land included in the property and the remaining land reserved to seller. Exceptions, of course, apply if the acreage reserved to seller is considerably more (or less) valuable on a per acre basis than the acreage conveyed to the buyer.

### **Credit for Realty Transfer Tax Benefit**

In Pennsylvania, a 2% tax is assessed on all transfers of real property (other than certain statutorily excluded transactions). By custom, seller and buyer split the tax (1% each). Transfer to a conservancy is an [excluded transaction](#) (061 Pa. Code § 91.193 (18)); thus, absent an agreement to the contrary, the seller receives a windfall (1% tax savings) arising solely from buyer's status as a conservancy. The Conservation Transaction Addendum discussed in the guide [Purchase and Sale Agreements](#) provides for a credit to buyer for the transfer tax the seller would have paid but for the applicability of the exclusion.

### **Credit for Prepaid Rents and Security Deposits**

Sometimes land is acquired subject to farming or other leases. The understanding of the parties as to allocation of rents should be addressed in the purchase agreement;

however, as a general rule, rents allocable to periods following the closing date are prorated on a daily rate basis. For example, if the tenant has paid, prior to the closing date, rent through the last day of the month, the seller pays over to the buyer the daily rental times the number of days between the closing date and the last day of the month. Don't forget to have security deposits (and/or last months' rents) accounted for and transferred over to the buyer as well!

## Costs and Expenses

The second page of the HUD-1 settlement sheet allows the seller and buyer to record payment of costs and expenses incurred in connection with the closing.

### Title Charges (1100 series)

In Pennsylvania, the custom is that buyer pays the title insurance premium and other title charges incurred in connection with a transfer. The title insurance premium is regulated by law and is based upon the purchase price for the interest. If no policy is purchased, the title company is permitted to charge for costs incurred in searching title.

#### *Why Buy a Title Policy?*

Title insurance is a prudent investment. Besides insuring the accuracy of the title company's examination of the public title records, the title insurance policy insures against a number of unknown and unverifiable off-record risks.

- Swindlers and con artists have sold land via bogus deeds and phony signatures for centuries. Even the most diligent title search may not be able to detect a fraud perpetrated decades in the past. The title insurance policy shifts the risk of potential loss due to fraud in the chain of title to the title company.
- Good title depends upon dozens of factual and legal issues that are impossible to verify after decades or even centuries have passed. Was a corporate grantor named in a 1920 deed properly formed and was the transfer properly authorized by the board in accordance with the bylaws? Were the grantors of a 1940 deed all of the relatives of a decedent who may or may not have left a will? If title derives from a tax or other judicial sale at some time in the past, title may be good and marketable, or not, depending upon whether proper notice of the sale was given and whether the sale was lawfully administered. Title policies insure over all these risks.

#### *When Title Insurance May Not Be a Good Investment*

Title insurance policies are policies of indemnity; they insure against actual monetary loss incurred due to a covered title defect. Without a monetary loss, there may be no coverage. In cases of a wholly donated parcel of land or easement, the land trust should discuss with counsel and the title company what, if any, protections it will have if it purchases a title policy.

#### *When Co-Insurance Applies*

Title insurance policies include a co-insurance provision. This means that if a property is worth \$100,000 and the insured pays the premium based upon a \$50,000 purchase price, any covered loss will be shared 50% by the title insurance company and 50% by the insured. That applies to a bargain-sale purchase price as well. The purchasing land trust will be "self-insured" for the portion of the claim equal to the ratio of the donated value to the purchase price.

### Recording Charges (1200 series)

In Pennsylvania, the conveyance to the purchasing land trust is ordinarily exempt from realty transfer tax (whether the conveyance is in fee simple or a conservation easement) under §91.193 of the Pennsylvania Code as excluded transaction (18) for [transfer to a conservancy](#).

Remember to prepare the [realty transfer tax statement of value](#) (Pennsylvania Department of Revenue form) to claim the exemption.

## Closing

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### Arrangements for Absentees

It is customary in Pennsylvania to have a sit-down, face-to-face closing of a real estate transaction, often held in the office of a settlement agent. However, it is often not feasible to have all of the project participants attend the closing. This section provides strategies to achieve closing in the absence of one or more project participants.

### Escrow Delivery

#### *Setting Conditions on Release*

A non-attending participant may deliver the necessary documents or funds to a responsible person (often the settlement agent) to hold, in escrow. Escrow deliveries should always be accompanied by a letter instructing the escrow holder of the precise conditions that must be met for release of the escrowed documents or funds. The escrow holder is legally permitted to release the documents or funds from escrow only when all of the identified condi-



tions are met. The escrow holder also needs instructions on what to do if conditions are not met; for example, what happens if closing does not occur by a certain date? Escrow delivery, accompanied by precise instructions, assures project participants that their intentions will be carried out even if they are absent from the closing.

#### *Conflicting Conditions*

An escrow holder may receive conflicting instructions from different project participants. Or a project funder may set conditions on availability of project funding that run contrary to the rights of the sellers under the purchase agreement.

*Example:* Funder requires settlement agent to have, in hand, the recorded documents before its funds are delivered into the closing. The funds are, of course, needed to pay the purchase price and the seller, understandably, refuses to release a signed deed for recording until payment in full is received (or, at least, in the hands of the settlement agent).

This conflict is easily solved by escrow delivery of project funding to the account of the settlement agent accompanied by instructions to release upon written verification to the project funder that the settlement agent has received the deed or conservation easement document in recordable form accompanied by the marked-up, signed and re-dated title commitment. The simple solution, however, may not be possible if the funding condition (“recorded” documents, not “recordable” documents) is set by official policy or regulation. For that reason, it is important to review the project funder’s prerequisites for releasing project funding early in the process to determine if there is any conflict and, if so, whether it can be resolved by escrow delivery.

#### **Pre-Signing Documents**

If the final form of the document is available for signing prior to the closing, arrangements may be made for signing before a notary public authorized to acknowledge the signature. Caution! Some recorders reject documents with a notary acknowledgment date earlier than the document date. To avoid that problem but maintain the closing date as the effective date of all documents, change the recital of the document date as follows: “signed [insert earliest acknowledgment date] but delivered [insert closing date.] If multiple signatures are required on the document, and some will be collected prior to closing, it is good practice to include a provision in the document allowing execution in multiple counterparts. Also consider whether delivery of the pre-signed document into or in advance of closing is

conditional or not. If it is conditional, follow the instructions above for escrow delivery.

#### **Authorizing an Agent to Sign on Behalf of an Individual**

##### *Agency Not Permitted*

In Pennsylvania, a person authorized to sign documents in an official or fiduciary capacity (for example, as president of a corporation or as trustee for a trust) may not appoint someone else to sign in their stead (other than another officer or trustee authorized to sign under the documents governing the entity). See the discussion in the guide [Authorization of Real Estate Transactions: Rules and Processes for Nonprofits](#).

##### *Agency Permitted*

Individuals may appoint an agent to sign, under a power of attorney, documents and other items (including the settlement sheet), which must be signed at closing. The form of [power of attorney](#) in Pennsylvania is set by statute (20 Pa. Cons. Stat. § 5601). Furnish the power of attorney to the title company before closing because the title company must be satisfied that the power is properly executed and in recordable form and that the scope of the agency created by the power covers all of the documents needed for closing. The power must be recorded with any documents signed by the appointed agent. The statute also provides for a sworn certification by the agent to be appended to the document evidencing that, at the time of signing, the agent had no notice from the person appointing the agent that the person had revoked the power.

#### **Good Closing Practices**

Experienced real estate practitioners never leave the closing table without checking off all the items in the closing checklist and taking signed copies of all of the documentation delivered into the closing. In addition to those fundamental requirements, other good closing practices are discussed below.

#### **Marked-up Title Commitment**

When a title policy is purchased to insure an investment in land or easement, the practitioner must be sure not to leave closing without a marked-up and re-dated title commitment, initialed by the settlement agent, evidencing satisfaction of the requirements of insurance on Schedule A and removal of taxes, liens and other items to be delivered by seller on Schedule B-1. The practitioner should check Schedule B-2 as well to be sure it conforms to the understanding pertaining to title and survey reached during the due diligence investigation.

## Order of Recording

For complex transactions, holders of different conservation interests in the property need to direct the title company as to the proper order of recording of their respective interests.

*Example:* Several project participants are funding different aspects of a transaction: conservation easement; trail easement; fee simple interest. There may also be deeds of dedication and purchase money financing or leases. The holders of all of these interests need to agree upon the priority of these interests vis-à-vis each other. The directions to the title company as to order of recording will reflect these priorities.

This topic will be more fully discussed in the future Pennsylvania Land Trust Association guide Co-holding and other Conservation Project Participations [working title].

## Post-Closing

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### Title Policy

The marked-up title commitment is a contract, binding upon the underwriter, to issue a title policy in accordance with the commitment. The title policy is typically issued when the insured documents are returned from recording.

### Recorded Documents

#### Receipt

Documents are typically returned with the title policy; however, if the buyer needs the recorded documents earlier so as to comply with requirements of project participants, inform the settlement agent. In many counties, recorded documents are now available for pickup from recorders' offices within days of delivery for recording. In some Pennsylvania locations, recording may be completed within minutes of closing. The title company electronically transmits scanned documents to the recorder and the recorder electronically transmits a receipt with document identification number and date and time of receipt.

#### Closing Binder

It is a good practice to prepare a binder containing all of the documents and other items pertinent to the transaction for future reference. A checklist based on the [Model Checklist for Real Estate Transactions](#) is easily transformed into the index for the binder by deleting the 3rd and 4th columns and most of the non-numbered rows (those that contain reminders rather than items to be included in closing binder). The remaining numbered items should corre-

spond to the final signed documents, reports and other items to be included in the binder.

## Substantiation of Donation

If the land or easement is being donated in whole or part and the donor intends to claim a federal tax deduction for making a charitable contribution, then the recipient of the gift must issue a substantially contemporaneous [acknowledgment of the donation](#) (as described in IRS Publication 1771, Charitable Contributions–Substantiation and Disclosure Requirements).

For non-cash donations of \$5,000 or more, the recipient of the gift must sign the [IRS Form 8283](#) as well.

For an in-depth discussion of these requirements, see the guide [Pledges and Donation Agreements](#).

## Related Resources at ConservationTools.org

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[Authorization of Real Estate Transactions: Rules and Processes for Nonprofits](#)

[Pledges and Donation Agreements](#)

### Experts

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Pregmon authored this guide. Pregmon offers more than decades of experience in real estate law and has helped scores of clients achieve their goals.

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## Submit Comments and Suggestions

The Pennsylvania Land Trust Association would like to know your thoughts about this guide: Do any subjects need clarification or expansion? Other concerns? Please contact Andy Loza at 717-230-8560 or [aloza@conserveland.org](mailto:aloza@conserveland.org) with your thoughts. Thank you.

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