

Restricted Gifts

Issues to Consider Before Making or Taking a Gift for a Specific Purpose



A restricted gift of cash, land, easement or other property may only be used for a particular purpose rather than an organization's general purposes. Both donor and donee need to be aware of the issues raised by limiting the use of a gift.

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Summary

As a general rule, gifts of cash, land, easements or other assets to a charity may be used, at the discretion of the charity, for any of its charitable purposes. A conservation organization soliciting a gift for a specific purpose, or a donor willing to give only for a specific purpose, may be creating a restricted gift, a gift which

limits—sometimes sharply—the organization's discretion in managing the gift.

A specific purpose may be defined narrowly or broadly. The narrower the purpose (in other words, the more restrictive the gift), the greater the likelihood that it will present management challenges to the organization.

Since restricted gifts present special challenges, a conservation organization is well served by establishing a gift acceptance policy that addresses restricted gifts; also, essential to proper administration is a system to keep track of restrictions so that the organization doesn't inadvertently violate the terms of the gift at a later date. Whether or not a policy and system are in place, before accepting a restricted gift, an organization should evaluate whether the specific purpose is consistent with the organization's purposes and sufficiently compelling to honor for the life of the gift.

If the donor intends a gift to be restricted, a donation agreement between the donor and donee that spells out the gift's restrictions and addresses related matters helps prevent misunderstandings and, if relations sour badly, litigation.¹ The donation agreement also affords the donee the opportunity to consider the long-term consequences of accepting a gift with strings attached.

A gift to a conservation organization can result in federal tax benefits for the donor. Restrictions on use of the gift, depending on their nature, can jeopardize a tax deduction. A donor should work with legal counsel to understand the issues and risks of placing restrictions on a gift.

¹ For examples of the protracted litigation that can result from disputes over restricted gifts, see John K. Eason, "[The Restricted Gift Life Cycle, or What Comes Around Goes Around](#)," 76 Fordham L. Rev. 693 (2007).

Organizations can inadvertently create restricted gifts if they unwittingly commit to specific uses of gifts in their solicitation materials. Or they can intentionally solicit gifts for a restricted purpose to motivate donors to invest in a certain project rather than generally support the organization. In either case, they should take care in crafting their solicitations so as to restrict the use of the resulting donations only if and to the extent that the benefits of the restrictions outweigh the pitfalls of managing the restrictions.

Honoring Donor Intent Without Hampering Mission

Potential donors can be more motivated to donate to an organization if they know that their contribution will be applied to a specific purpose dear to their hearts. A challenge for any organization is to generate enthusiastic financial support for the organization's work without unduly limiting flexibility to use contributions effectively and efficiently.

In focusing on the topic of restricted gifts, this guide is not intended to promote them. Although restricting the use of a gift may be appropriate in certain circumstances, organizations *generally* should (1) encourage would-be donors who are inclined to restrict their gifts to instead consider giving the donation without strings and (2) if a donor insists on restrictions, seek to maximize the organization's latitude in managing the gift—restrict the gift only to the degree absolutely necessary to obtain the gift and, even then, not so much that the management problems raised by the restrictions outweigh the benefit of the gift.

Why dissuade donors from restricting gifts?

Most fundamentally, a charity should be driven by its mission—by its service to the public good, not by the idiosyncratic wishes of donors.² Certainly, satisfying

the wishes of donors can be a winning pathway to success in advancing an organization's mission. However, an organization risks drifting into a mode of putting donor wishes before mission if it doesn't have institutional safeguards to remind it that mission comes first (for example, a gift acceptance policy and organizational practices that encourage donors to make unrestricted rather than restricted gifts). The organization also risks a pattern of donors coming to see the organization first as a service provider to the donor and only secondarily (if that) as an independent organization dedicated to the broader public interest. An organization may over time experience a drop in unrestricted giving, ever more strings placed on gifts, and donors ever more demanding of personal service if it isn't careful in managing its giving programs.

Why trust that an unrestricted gift will be well used?

Smart charities honor donor wishes as expressed at the time of gift acceptance, whether or not those wishes are made mandatory with gift restrictions. A charity won't receive gifts if would-be donors see that other donors are dissatisfied. And donors—particularly major donors—talk to one another.

Tax counsel often advise their donor-clients to use the phrase “request but do not require” to make the donor's intentions known and reach an understanding with the donee (albeit legally unenforceable) as to the future use of the gift.

If it turns out that a donor's wish can't be respected, a smart charity will talk with the donor about how it can responsibly use the gift and, without ceding its decision-making to the donor, seek to find a solution both satisfactory to the donor and consistent with the advancement of the organization's mission.

² For a succinct and blunt assessment of why restricting gifts is a bad idea, see Ken Hoffman, “[No Strings Attached](#),” first published in the Third Sector in 2001 and available at [ConservationTools.org](#) and in the [Nonprofit Law Resource Library](#) of Hurwit & Associates. “[T]he truth is that restricted operating gifts—money for only one project and not

another—are a waste of everyone's time and energy.... Rather than catering to the donor's sense of importance let income be allocated by the charity's board and staff. Then, a year later, the donors can assess the results and decide whether to make another gift—unrestricted of course. Less fun for donors, but better results for the causes served by charities.”

Why, if wishes are honored anyway, should organizations avoid restrictions?

As discussed below, restrictions have a number of pitfalls. However, even if the problems are resolvable or acceptable to donor and donee, a central question remains: Whose judgment should control if circumstances in the future change beyond anyone's expectations? Arguably, the organization's board of directors, in its reasonable judgment, is better positioned to decide a course of action than a piece of paper expressing the donor's preferences, which couldn't possibly have fully accounted for the changed circumstances.³

Planning for Restricted Gifts

Gift acceptance policy

An organization whose board of directors proactively considers the issues attached to restricted gifts and establishes a policy on gift acceptance will be well positioned when the organization is confronted with the need to make a quick decision on whether or not to accept a proffered gift. Kathryn W. Miree writes that:

The primary benefit of gift acceptance policies is to maintain discipline in gift acceptance and administration. Discipline prevents the acceptance of gifts that will cost the nonprofit organization time, money, and possibly its reputation, by reminding the organization when to say, 'No.'⁴

The gift acceptance policy instructs those in charge of development for the organization as to the inquiries

³ See, e.g., Robert A. Katz. "Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets," 80 Chi.-Kent L. Rev. 689, 701 (2005) (contrasting restricted versus unrestricted gifts to charity).

⁴ Kathryn W. Miree, JD, "[Understanding and Drafting Nonprofit Gift Acceptance Policies](#)," Kathryn W. Miree & Associates, Inc., 2003. This article not only discusses the fundamentals of gift acceptance policy but also highlights considerations applicable to different gifted assets (for example, gifts of stock shares raise different issues than gifts of real estate) and the different questions that need to be asked and due diligence inquiries to be made before acceptance of different gifted assets.

and information they must collect and report on to the board (or subcommittee or person designated by the board) before action is taken to accept a gift earmarked for a particular purpose. (Since a restricted gift may place a substantial long-term limitation on the conduct of an organization's affairs, it is advisable for boards to place responsibility as to whether to accept a restricted gift as close to the board-level as is reasonable given the size and complexity of the organization.)

The criteria outlined in the Criteria for Acceptance section below can be used to inform the development of a new policy or modification of an existing policy. Examples of gift acceptance policies are available under the [Gift Acceptance & Solicitation Policies](#) topic at ConservationTools.org.

Systems to track restricted gifts

Restricted gifts require special treatment in an organization's accounting and other systems for a number of reasons:

- The entire organization must be aware of the restrictions so as not to unwittingly violate the terms at some time in the future.
- Generally accepted accounting standards require that restricted gifts be distinguished from the organization's other assets.⁵
- Organizations, when pledging their assets to support a line of credit or other loan facility, need to disclose to the lender, and take care not to violate, a restriction on the use or transfer of those assets. (A lending institution may choose not to count a restricted asset as part of an organization's net assets when making a lending decision.)
- When organizations seek to merge or otherwise restructure, gift restrictions on transfer of assets must be addressed.

⁵ See Financial Accounting Standards Board Standard #116, available at <http://www.fasb.org/resources/ccurl/770/425/fas116.pdf>.

Criteria for Acceptance

Even if a conservation organization has not adopted a gift acceptance policy, it should nevertheless collect sufficient information for the board (or an authorized subcommittee of the board) to make an informed decision on whether to accept the gift as restricted or not. (Gift restrictions constrain the board's discretion on the use of the organization's charitable assets; thus, the decision to accept the restrictions is most appropriately⁶ a matter for board deliberation.) Some pertinent questions to address are discussed below.

Is the gift's purpose consistent with organizational purpose?

Is the purpose of the gift consistent with the organization's purpose and goals? Is the gift sufficiently compelling for the organization to want to honor the particular purpose for the life of the gift which, depending on its nature, could last for centuries?

Example. Landowners offer a gift of farmland on condition that the land trust employ at all times a resident manager to continue farming the land. The land trust is primarily engaged in preserving natural areas (not farmland) and, if it accepts the gift, can easily (and more cost-effectively) rent the land to a competent, experienced farmer in the area. Acceptance of the gift does not further the land trust's primary programmatic goals. Acceptance only makes sense if the gift provides cash flow to support the organization. To make a fully informed decision, the organization will have to analyze how much cash flow will be available over time if the donor insists on the resident manager restriction. And, whether or not the donor is flexible on this restriction, the organization will have to determine whether the cash flow is sufficient to justify accepting a gift that is only peripherally related to its programmatic work.

⁶ Gifts of real estate, restricted or not, generally necessitate board approval. See [Authorization of Real Estate Transactions](#) at ConservationTools.org.

Are the restrictions reasonable and not micro-managing?

Does the donor place any requirements on the management of the gift that are inconsistent with the organization's goals? Are there troublesome devils in the detail?

Example. Landowners may wish to donate their farm to a land trust with requirements restricting use of the land to sustainable agricultural production and educational purposes. So far so good. But what if the landowner wants to prohibit horses or hunting? Or what if the landowner wants to require use of a management system that includes expensive practices in support of sustainability that the land trust doesn't believe to be scientifically credible?

Does the gift generate a net positive impact?

A gift that appears generous on its face may instead prove to be a liability. Especially when the gifted asset is real estate, the land trust must exercise the same due diligence as it would if it were purchasing the property. Environmental liability is an obvious concern; other liabilities are not as readily apparent. This caution applies to all gifts but restricted gifts that constrain transfer or management decisions require thorough examination to guard against potential pitfalls.

Example. Land trust accepts the gift of a property with a lake formed by a dam within the property. Shortly after the deed is recorded, the DEP informs the land trust that the dam is in dangerous condition and must be rebuilt at a cost of several hundred thousand dollars. There is no recourse to the donor (unless by contract the donor retained responsibility for the condition of the dam or represented that it was in good condition and in compliance with laws). The cost of breaching the dam and eliminating the lake is quite small relative to value of the land being conveyed—a real net positive for the organization. However, if the gift came with a restriction requiring the lake's continued existence, the costs of rebuilding present an entirely different value proposition.

The Donation Agreement

There is no set formula for creating a restricted gift.

All that is needed is an offer to give a gift to a charity for a specific purpose (that is, a purpose more restrictive than the charity's stated charitable purposes) and acceptance by the donee of the gift as restricted. Misunderstandings arise when the intentions of the donor are not clearly communicated to, and accepted by, the charity. The donor's intentions may be expressed in ways which may not alert the charity (on receipt of the gift) of the possibility that donor intended it to be used only for a specific purpose. Ambiguity and miscommunication may require court intervention to decide (based on the facts of each case and, perhaps, sympathy for the donor or donee) whether the gift is restricted or whether the donor's expression of intent was merely precatory (that is, advisory but not legally binding on the donee).

Examples of poor communication in gift giving and acceptance include the following:

- Donor indicates a general intent to give a substantial gift in the future and a staff member of the land trust replies that a gift of \$50,000 would allow the charity the ability to pursue a certain project. A gift in that amount is later received without any accompanying letter indicating donor intent.
- A property is devised to the land trust in a will with no purpose expressed. There is a letter from long ago in the land trust's file indicating that the donor intended to give the property to the land trust for use as a preserve. The natural resources of the property are not preserve quality under current standards.
- The development office of the land trust deposits a check in the general fund without noticing the phrase "for the Valley Green project and no other purpose".

Problematic communications such as these can be avoided by a written donation agreement signed by donor and donee. Both donor and donee benefit when the terms of the gift are clearly understood and accepted at the time of the gift. Key issues to be

addressed in a donation agreement are outlined below.

Defining purpose—the restrictions

The purpose of the gift may be to further the organization's charitable purposes generally or for a specific purpose. A specific purpose may be defined narrowly or broadly. The narrower the purpose, that is, the more restrictive the gift, the greater the likelihood that it will present management challenges to the organization. The acceptability of a narrowly drawn purpose may depend on whether the donee is certain that, if the gift is given, it will definitely be used for that purpose and no other.

Example. A gift is offered strictly for the purpose of constructing and maintaining an aviary within a preserve owned by the land trust. The gift is sufficient in itself to fund the project and the land trust has all of the permits and is ready, willing and able to commence the project upon receipt of the gift. The narrow donor purpose in this case may be of little concern to the donee.

On the other hand, a gift to support a program or project that is dependent upon other funding or that may be discontinued for any number of reasons, requires flexibility in defining its purpose. The possibility of discontinuance must be discussed with the donor who may want to stipulate alternate uses (in which case it remains restricted) or may allow the gift to be used generally in furtherance of the organization's charitable purposes (in which case it is no longer restricted).

Example. A gift is offered to assist with the long-term funding of a project for reintroduction of an endangered species. The project's longevity will depend on the results of the first few years and the availability of additional support. If the donor wants to include a specific purpose clause, the purpose should be broadened beyond the specific program to include other programs and projects to protect endangered species or, even broader, such other programs benefiting natural habitat as are determined in the discretion of the land trust.

Documenting Gift Purposes

A seemingly unrestricted gift

If a major gift arrives without stipulations and staff are unanimous in believing that no expectations had been set as to the use of the gift, then staff might reasonably note this information in its files and simply send a gift acknowledgement that confirms that the gift was received and will be used to advance the goals (or mission or purposes) of the organization including general support of the organization.

If, however, there is a substantial question as to the donor's intention, then it may be in the best interest of both the donor and donee to document that the gift is unrestricted in a simple gift agreement.

Three alternatives for a gift agreement

Whether a gift is intended to be restricted or not, an organization may want to create a gift agreement template that opens with a statement intended to provide comfort to the donor that a donation will be responsibly used. It may begin by describing the mission, purposes and/or goals of the organization and stating the commitment of the organization to fulfill its obligations under the law and to act ethically.

After this opening statement, the gift agreement may follow one of three basic pathways—the documentation of (1) an unrestricted gift; (2) the description of a donor's request (but not requirement) to use the gift in a particular way; or (3) the specification of a particular purpose for the gift narrower than the organization's general purposes. Rough sketches of provisions for each pathway are as follows:

- Unrestricted gift: "Donor intends the gift to be used, in the discretion of the organization, to further these purposes, including general support of the organization."
- Request but not require: "Donor and ____ have discussed use of the gift for _____. Donor requests but does not require the organization to use the gift for this purpose." This phrase makes the donor's intentions known and establishes an understanding with the donee (albeit legally unenforceable) while ensuring the usefulness of the gift in the long run.

- Specified narrow purpose: "Donor intends the gift to be used specifically for the purpose of _____."

Building in resilience

In the case where a donor wishes to take the third pathway—the specification of a particular purpose—an organization, to avoid future problems if changed circumstances make the purpose of a gift unrealizable or inconsistent with the organization's conservation mission, may seek to include a provision in the gift agreement to ensure that the organization will be able to avoid undue administrative costs and stay true to its mission in the event of such circumstances. For example:

If circumstances should arise such that the uses and purposes for which this donation has been accepted are no longer existent and/or are in conflict with policies of the organization, then the Board may use the gift in a manner which is in the best interest of the organization, bearing in mind the wishes of the donor(s) set forth herein.

The intent of this provision is to commit the donee to the donor's specified purpose for as long as feasible, as determined by the board, *with documented permission by the donor to redirect the use of the gift* in the discretion of board without the need for court approval or notice to the state attorney general.⁷

To provide the donor comfort regarding how this provision might be acted upon, the donee could point the donor to a donee policy (assuming it exists), that the organization reaches out to donors (or, if deceased, interested family members), if circumstances change

⁷ A provision such as this bolsters the charity's position that it may use its own good faith, reasonable judgment to decide when purposes are infeasible and redirect funds to support other needs of the charity. However, even with this advance approval by donor, the charity must weigh carefully whether to proceed without court approval of the change. "The degree of managerial discretion courts will accept before finding abuse appears to be an open question. In addition to reasonableness and good faith, the answer to this question will likely depend upon the level of specificity the donor has provided, the proffered interpretation, and other circumstances...." [Eason](#) at 724.

and the organization is looking to redirect the use of the gift to a modified purpose.

Conditions on gift offer and acceptance

The donee will want to condition its acceptance of a specific piece of land (or funds for acquisition of specific real property) upon any of the conditions typically found in a purchase and sale agreement; for example, satisfactory inspection of the physical condition of the property and the title being conveyed; issuance of permits and approvals for the intended use; and receipt of funding required from other sources.

The donor may want to condition delivery of the gift (or the amount of gift) on certain occurrences; for example:

- A donor wants to make a substantial gift but also wants to challenge other donors to come forward. The donor commits to donating up to \$200,000, matching dollar for dollar every other private donation received by the donee during a set period of time.
- A donor wants to fund a land acquisition but only if there is certainty that closing is about to occur.

Conditions to the effectiveness of a donor's gift *after it has been given* (for example, by a reversion if some condition is not met) are problematic—particularly from a tax perspective.⁸

Representations

As made evident in the example of the failing dam, the donee should want the donation agreement for a gift of real estate to include donor representations about the physical condition of the property and its compliance with laws. Depending on the type (real

estate, stocks, art, etc.) and specifics of the gift, the donee may also want other representations from the donor.⁹

Organizations should take care to avoid making representations to donors on tax issues. The donation agreement can include a representation on the part of both the donor and the donee that each has relied on its own professional advisors' guidance with respect to the donation and not any advice from the other or the other's consultants or agents.

Tax Consequences of Restricting Gifts

No deduction unless donor gives up control

For federal tax purposes, a contribution is deductible only if it is made "to or for the use of" a charitable organization.¹⁰ A donor may earmark a contribution to a charity for a particular charitable use without jeopardizing the charitable deduction, provided the restriction does not prevent the charity from freely using the transferred assets or, at a minimum, the income therefrom, in furtherance of its charitable purposes.¹¹ When a donor restriction goes too far, when the donee does not have dominion and control of the gifted asset and may not freely use the transferred asset, then there is no gift qualifying as a deductible contribution. What constitutes a restriction that the IRS will identify as *going too far* is far from predictable. Donors considering gift restrictions are urged to consult their tax advisors to navigate this uncertainty.

Restrictions can reduce tax benefits

A restriction on a gift may diminish the value of the donor's income tax deduction.

A prospective donor may want to donate their land to a land trust with the desire that the land be used for a specific purpose, for example, a nature preserve. In gifting the land, the donor may look to place a deed restriction on the property, restrict its use in a trust

⁸ "A charitable deduction will also be disallowed if a transfer is dependent on the performance of some act or the happening of an event before the transfer becomes effective, unless the possibility that the event will not occur meets the 'so remote as to be negligible' test." Alan F. Rothschild, Jr., "Planning & Documenting Charitable Gifts," *Probate & Property*, July/August 2006, 54. This however does not damage the possibility of the donor receiving a tax deduction in the year the transfer becomes effective. In any case, advice of tax counsel is recommended.

⁹ See Miree.

¹⁰ §170(a) Internal Revenue Code.

¹¹ Treas.Reg. §1.170A-1(e).

agreement or obtain a written commitment from the organization to guarantee the land's permanent status as a preserve. Such actions may have serious tax consequences if the donor seeks federal tax benefits in association with the donation.

If a donor places a restriction on the use of contributed property that affects the property's marketability, the value of the gift as determined for tax purposes must be reduced accordingly. In a 1985 ruling¹² by the Internal Revenue Service, a landowner donated to a college a property under a deed of gift containing a restrictive covenant limiting the land's use to agricultural purposes. The IRS found that the gift must be valued at the land's restricted agricultural value rather than its unrestricted value.

This finding was affirmed by the IRS in a 1986 private letter ruling.¹³ The IRS determined that land that was to be gifted with donor-imposed restrictions regarding mining and building heights (and that provided the donor with a right of first refusal if the land were to be sold by the charity to other than a charitable organization) had to be valued in light of the restrictions for charitable deduction purposes.

Alternatives to restricting gifts of land

Given the tax-adverse consequences of restricting a gift of land, the donor and conservation organization may consider several alternatives:

- The landowner could proceed with the desired restrictions and be content with taking a smaller tax deduction or perhaps no deduction at all.
- Donors advised by tax counsel often use the phrase "request but do not require" to make their intentions known and reach an understanding with the donee (albeit legally unenforceable) as to the future use of the gift.
- The landowner could rely on the organization's solid reputation and commitment to conservation in making an unrestricted gift. Any charitable gift must be used to further the charity's stated purposes. If the organization's central purpose is to

conserve natural and scenic resources, it is unlikely to treat the gifted property poorly.

- The landowner could first donate a conservation easement, which restricts use of the land for conservation purposes, to one land trust *and* then donate title to the land to a second charity (which may also be a land trust). The conservation easement donation may qualify as a charitable donation for federal tax purposes.¹⁴ The gift of land under and subject to the conservation easement may also qualify as a charitable contribution. For federal tax purposes, the aggregate value of the two gifts is likely to be similar to the value of an unrestricted gift of land.¹⁵

Considerations for Gift Solicitations

A conservation organization may inadvertently cause gifts to be restricted if it solicits gifts for a particular project without including in its solicitation materials an alternative use of the funds collected. For example, if the land trust solicits donations to acquire land for a preserve and, for some reason, closing does not occur, can it apply the funds collected to other land acquisition projects? Can it keep the money in its general fund? Solicitation materials must be carefully worded so as to avoid demand for the return of a gift on grounds that it was made only upon condition that a certain event occur. A wide variety of alternative uses is always advisable when donations are solicited to acquire land or easements. Real estate transactions are never a sure thing until finally closed. Broad language in solicitation materials also covers the happy circumstance when the solicitation raises more money than

¹⁴ See the "Tax Benefit" section of the ConservationTools.org guide [Conservation Easement](#) or the many other materials available online concerning federal tax benefits.

¹⁵ This approach can result in higher transaction costs due to additional appraisal, legal and other needs as well as long-term stewardship costs since the easement-receiving land trust will have an obligation to monitor and enforce the easement in perpetuity. (This alternative may not be feasible in some areas due to lack of a second reliable land trust with which to partner.)

¹² Rev. Rul. 85-99, 1985-2 C.B. 83

¹³ Ltr. Rul. 8641017

needed for the solicited project. Samples of solicitation language that can help an organization avoid restricted gift problems include:

- Donations to the Greenway project will be used for land acquisition of the Greenway Trail right-of-way; installation and maintenance of trails and related recreational facilities; or other purposes conserving natural and scenic resources or promoting healthful outdoor recreation within the watershed of Greenway Creek.
- All donations to the project will be applied to Happy Hollow real property purchases or placed in a restricted stewardship fund that ensures permanent care for the Trust's Happy Hollow conservation lands.
- If, for whatever reason, your generous gift is ultimately not needed to complete the acquisition, Land Trust will use your contribution for future land acquisition projects in the watershed.
- Land trust will use your gift efficiently and effectively to make conservation happen. In the unlikely event Land Trust doesn't need or can't use your donation for the XYZ Project, it will...

Conservation Easements

As discussed in the guide [Not a Charitable Trust](#),¹⁶ conservation easements do not in and of themselves constitute restricted gifts in Pennsylvania. A conservation easement may be made as a restricted gift following the procedure that one would use to create any other restricted gift in Pennsylvania.

Generally this is neither necessary nor desirable when the [Model Grant of Conservation Easement](#)¹⁷ or an easement instrument that uses covenants similar to the model is used. The model grant contains holder covenants that obligate the land trust to uphold the conservation objectives of the easement in perpetuity and provide a mechanism for Pennsylvania courts to substitute a competent, reliable land trust for a holder

¹⁶ Pennsylvania Land Trust Association, 2015.

¹⁷ Maintained and published by the Pennsylvania Land Trust Association at http://conservationtools.org/library_items/323.

who seeks to change the conservation purposes of the easement or fails to properly manage the easement to achieve those purposes. For more information about how holder covenants serve to uphold conservation objectives, see [The Nature of the Conservation Easement and the Document Granting It](#).¹⁸

Pennsylvania Law Applicable to Restricted Gifts

Pennsylvania charities are governed by the Pennsylvania Nonprofit Corporations Act; however, their rights and obligations with respect to charitable gifts are governed by principles derived from a long history of case law and statutes dating back to the late middle ages.¹⁹ The basic principle is that a charity that accepts a gift must not deviate from the purposes for which it was given and accepted. If property is simply donated to the charity, then the gift must be used in support of the stated charitable purposes of that organization. If the gift is given for a specific charitable purpose (presumably within the scope of the charity's general purposes), then the charity must use the gift for the specified purpose. The special responsibilities of a charity with respect to the use and management of its charitable assets are similar to the fiduciary responsibilities of a trustee with respect to trust assets. Over time, this similarity resulted in judicial decisions describing charities as trustees of their charitable assets and the public as beneficiary of that trust. The Commonwealth of Pennsylvania acting through the Office of the Attorney General is recognized by this case law as having authority to protect the interest of the public in charitable assets.

Statutory Authority to Act as Trustee

A charitable nonprofit corporation may accept property from a donor on the understanding that the

¹⁸ Pennsylvania Land Trust Association, 2014.

¹⁹ One of the earliest is the statute of uses enacted in 1601 in the reign of Queen Elizabeth I. An interesting summary of the history of philanthropy is included in a 1904 article in the American Law Register entitled "The Modern Law of Charities as Derived from the Statute of Uses" available at http://conservationtools.org/library_items/1385.

property is committed to a charitable purpose.²⁰ This authority, granted under §5547(a) of the Pennsylvania Estates and Fiduciary Code, exempts charities from meeting the qualifications and reporting obligations otherwise applicable to corporations acting as trustees. The fact that charities *may* act as trustees does not mean that every time a charity accepts a donation of real and personal property, it *must* hold that property in trust for any particular purpose. Unless the limitation set forth in §5547(b) applies as discussed in the following section, charities may buy, sell and exchange assets so long as they comply with applicable provisions of the Pennsylvania nonprofit corporations act.

Prohibition on Diversion of Trust Property without Court Order

A charity may not divert use of the property from the purpose for which it was donated without obtaining an order from a court of competent jurisdiction.²¹ In other words, property given to a charity may only be used for the charitable purposes of that organization

²⁰ 15 Pa. C.S.A. §5547 entitled "Authority to take and hold trust property" provides in subparagraph (a) as follows:

General rule.--Every nonprofit corporation incorporated for a charitable purpose or purposes may take, receive and hold such real and personal property as may be given, devised to, or otherwise vested in such corporation, in trust, for the purpose or purposes set forth in its articles. The board of directors or other body of the corporation shall, as trustees of such property, be held to the same degree of responsibility and accountability as if not incorporated, unless a less degree or a particular degree of responsibility and accountability is prescribed in the trust instrument, or unless the board of directors or such other body remain under the control of the members of the corporation or third persons who retain the right to direct, and do direct, the actions of the board or other body as to the use of the trust property from time to time.

²¹ 15 Pa.C.S.A. §5547 (b) provides as follows: Nondiversion of certain property.--Property committed to charitable purposes shall not, by any proceeding under Chapter 59 (relating to fundamental changes) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the court an order under 20 Pa.C.S. Ch. 61 (relating to estates) specifying the disposition of the property. (Dec. 21, 1988, P.L.1444, No.177, eff. Oct. 1, 1989)

(not charitable purposes other than those stated in its charter and not private purposes). Further, gifts made for a single charitable purpose (less than the entire range of charitable purposes for which the charity was formed) may not be diverted from that single purpose.

Fiduciary duties (other than non-diversion of charitable assets)

Except as discussed above with respect to the non-diversion of charitable assets, charities owe no special duties to act as trustees *for the benefit of the donor* or any other person unless they voluntarily agree to do so. The documentation used to create such a trust relationship is a trust agreement between the person granting the asset in trust (called the trust settlor) and the person willing to act as trustee. The agreement sets forth the specific fiduciary obligations assumed by the trustee for the benefit of the persons identified as trust beneficiaries. As to real property conveyed in trust, Pennsylvania law applies the rule known as the statute of frauds. No one (including any charity) is bound to act as trustee of property committed to it unless the entity has signed a written document evidencing its acceptance of the property in trust for specific trust purposes.²²

Resources at ConservationTools.org

To find experts on the topics covered by this guide, see the right hand column of the on-line edition at <http://conservationtools.org/guides/144>. The on-line

²² Pennsylvania Statutes, Title 33 Frauds, Statute of, 33 P.S. § 2 (2014)

§ 2. Declarations of trusts and grants thereof to be in writing
All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void: Provided, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed.

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