Land Trust Ethics – Part II

Fundraising and Grant Funding

by Konrad Liegel and Stefan Nagel

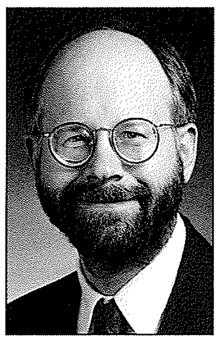
In the second of a two-part series, Konrad Liegel, Esq., and Stefan Nagel, Esq. answer ethics questions concerning fundraising and grant funding. Liegel is a partner with Preston Gates & Ellis in Seattle, Washington, with a concentration in complex conservation transactions and environmental, land use, real estate and nonprofit law. Nagel is of counsel to the Law Office of Stephen J. Small, Esq., P.C. in Boston, Massachusetts. His areas of concentration are complex real estate transactions, conservation and preservation easements and the law of nonprofits. Liegel and Nagel will be presenting a workshop titled "Legal and Ethical Aspects of Managing a Nonprofit Organization" for the tenth consecutive year at the National Land Conservation Conference, Rally 2004, on October 28-31 in Providence, Rhode Island.

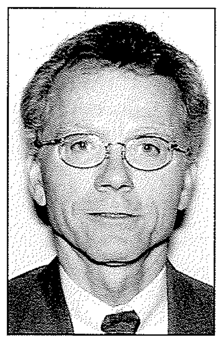
Land trusts are dependent for their success on public confidence. Without confidence that land trusts will expend as promised the funds requested by them in grant applications, governments and foundations will be reluctant to provide financial support for the conservation activities of land trusts. Without confidence that land trusts will expend the vast majority of the donations they receive on programmatic activities (and not on fundraising or administration), possible supporters will be reluctant to donate funds to support the conservation goals of land trusts.

In the second part of our two-part column we take up issues related to how land trusts should conduct their fundraising and grant funding activities so that the public and governmental authorities maintain confidence in land trusts and their conservation mission.

Fundraising

The law and ethics of fundraising are constantly evolving. While much attention has been paid in the past to board and "insider" activities, the activities of fundraisers and the resource development activities that give rise to donations (such as representations contained in charitable solicitations and the disposition of grant funds) have traditionally been bereft of ethical attention and direction. Increasingly, in light of the corporate accounting scandals and emerging fundraising issues at large national organizations, various associations of charitable organizations and state legislatures have begun to focus on charitable fundraising.


Konrad Liegel, Esq.


Stefan Nagel, Esq.

For additional information on these efforts, we encourage you to consult Standard 5 of the Land Trust Alliance's *Standards and Practices* and the Web sites for Independent Sector, the American Association of Fundraising Counsel, American Association of Grant Professionals and Association of Fundraising Professionals, among others. States have also attempted to legislate fundraising standards, with mixed results because of constitutional freedom of speech concerns that have drawn the attention of the U. S. Supreme Court. The responses to the questions posed below reference some of these sources and legislative efforts.

Because we are a new land trust, we can't afford to hire a professional fundraiser on an hourly fee or salary. May we retain a fundraiser on a contingency fee arrangement based on donations raised? If yes, are there any limits on the amount that a fundraiser may take as his or her fee?

There are documented cases of fundraisers representing to prospective donors that donations would be set aside entirely for charitable purposes even though the fundraisers under contingency fee arrangements have kept as much as 85 percent of all funds raised to pay their fees and expenses. The Association of Fundraising Professionals expressly discourages such arrangements. Paragraph 16 of its Code of Ethical Principles states as follows: "Members shall not accept compensation that is based on a percentage of charitable contributions; nor shall they accept finder's fees." Performance-based bonuses are deemed acceptable, provided they are not based on a percentage of charitable contributions.

Some states and communities have attempted through legislation to regulate contingency arrangements. The stated goal of charitable solicitation laws has been to discourage misrepresentations in those charitable appeals in which donors are assured that their contributions will be dedicated to charitable uses when, in fact, a large percentage goes to cover fundraising costs.

As a result of these legislative efforts, the U.S. Supreme Court has been brought into the discussion.

In its most recent pronouncement, *Illinois v. Telemarketing Associates, Inc.*, No. 01 - 1806 (U.S. May 5, 2003), the Court noted, in effect, that even arguably excessive contingency fee arrangements are not *per se* fraudulent. What is fraudulent—and, by extension, unethical—is if the fundraiser makes false or misleading representations designed to deceive donors about how their donations will be used. For example, if a fundraiser is to receive as his or her fee a majority of the funds raised, then he or she can't affirmatively or by omission represent that most of the donations will be paid over for charitable purposes. This position is reflected in Practice 5C of the Land Trust Alliance's *Standards and Practices.*

While the legal and ethical responses to the question may appear to diverge, by parsing the two directions it appears possible to fashion the following response: Yes, your fundraiser may take his or her fees out of the charitable contributions. The fees should not, however, be based on a percentage of the contributions. Instead, the fundraiser's compensation should be based on a flat fee arrangement, based perhaps on an escalating fee arrangement after contributions have reached defined thresholds, or on some combination of factors. Most importantly, the fee arrangement needs to be reasonable, transparent and not misrepresented to prospective donors.

Grant Funding

Land trusts often rely on grant funding to undertake conservation projects. This funding may come from foundation or governmental grants made in response to a land trust's application for grant funding.

My land trust has received grant funding from the state government for a conservation project. We have determined that we have a need to spend money for items not included or described in our grant application. What obligations do we have to the grant-making entity or public at large in deciding how we spend the grant funds we have received?

Governmental grants are awarded based upon a grant contract between the grant-making entity and the land trust. This grant contract specifies the items on which grant funding may be spent, the records that need to be maintained documenting how the grant funding has been spent, and the consequences of not abiding by the requirements in the grant contract. The grant contract often incorporates by reference the application for grant funding.

Accordingly, a land trust has a legal obligation to follow the requirements of its grant contract. It needs to keep good records of how it has expended the grant funds to ensure that its expenditures are above reproach if audited. If a question arises as to whether an expenditure is allowable under the grant (e.g., for an item not specifically included or described in the grant application), the land trust should contact the grant-making entity before spending money on the item in question and then document the decision made by the grant-making entity. If determined to be a contract violation upon audit, lack of this paper trail could subject the land trust to punitive actions—such as repayment of grant funds or an inability to qualify for grant funding in the future. Even if determined technically to not be a contract violation upon audit, a failure to document the grant-maker's authorization could create a public perception that land trusts are fast and loose with the governmental grants they receive, thereby undermining public confidence in land trusts and land conservation efforts in general.

*The next **Land Trust Ethics** column will cover questions collected at the National Land Conservation Conference, Rally 2004, which will be held in Providence, Rhode Island on October 28-31. You can also e-mail questions to Chris Soto at csoto@lta.org.*