

Southern Wisconsin Bird Alliance, Inc.
Land and Easement Acquisition Policy

I. PURPOSE

Southern Wisconsin Bird Alliance (SoWBA) intends to protect in perpetuity the property it conserves. To secure the perpetual conservation of land, transactions must hold up over time and withstand challenges. SoWBA works to ensure that every land and easement transaction is legally, ethically and technically sound. SoWBA may work with public granting applications that have a specific set of requirements to complete a land transaction. This policy addresses the steps to complete for any SoWBA land or easement acquisition project, regardless of funding source requirements. This policy applies to both conservation easements and fee land properties, and any property for which SoWBA may be in the chain of title.

II. POLICY

- A. Approval Process.** The SoWBA Board of Directors has final review and approval authority for every land and easement transaction. Staff shall provide the board with timely, comprehensive and accurate information prior to final approval.
- B. Capacity to Manage.** SoWBA shall not unreasonably burden itself, and shall ensure the project is within the capacity of the organization to acquire in the short-term, and to manage, monitor, and enforce for the long-term.
- C. Project Selection and Documentation.** SoWBA only pursues land protection projects that have a public benefit, and meet the organization's mission and *Project Selection Criteria*. Conservation values protected, public benefit served, and how the project meets the organization's *Project Selection Criteria* are documented for each project.
- D. Compliance with Laws.** SoWBA shall not jeopardize its non-profit status, participate in legally risky or ineffective transactions, and shall comply with federal and state charitable trust law, and honor donor and any project fund restrictions
- E. Conflict of Interest.** Each land acquisition project shall be reviewed/discussed for real or perceived conflicts of interest in accordance with the SoWBA *Conflict of Interest Policy*.
- F. Communication.** SoWBA shall communicate with land donors, land sellers, and project partners, reference IRS requirements, whenever appropriate, and document communications in writing.
- G. Conservation Easement Drafting.** SoWBA shall employ industry standard conservation easement models, individually tailored to a specific property.
- H. Baseline Documentation Reports.** SoWBA shall ensure that conservation easements have a signed *Baseline Documentation Report* (BDR) that is completed at or prior to closing. This BDR will, at a minimum, meet the Internal Revenue Service, U.S. Treasury Regulations, and Land Trust Standards and Practices requirements.
- I. Legal Review.** Every land and conservation easement transaction will receive adequate legal and technical review by an experienced attorney or specialist, as required by the complexity of the specific transaction.

- J. Project Purpose.** Prior to closing for each fee title transaction, SoWBA shall define, with high level land management goals outlined, the project purpose and/or vision statement.
- K. Recording.** All land and easement transactions shall be legally recorded according to local and state law in a timely fashion at the appropriate records office.
- L. Recordkeeping.** SoWBA shall follow the procedures and policies in its *Recordkeeping Policy* for every land transaction. SoWBA recognizes that maintenance of consistent, complete, secure, and accurate records is essential to achieving its conservation mission and maintenance of its public charitable status.
- M. Due Diligence.** SoWBA shall complete project due diligence activities prior to closing. Due diligence is the process of research and analysis to discover key information and potential problems before deciding to take a legal interest in property. Diligence activities are described in section III.F.

III. PROCEDURES

A. Project Approval Process

A specific checklist of the project approval process is documented in the *Project Checklist*.

General steps for project approval are:

1. Staff shall provide a preliminary screening of the project. If the project is adjacent to an existing sanctuary, the appropriate sanctuary managers shall prepare the *Land Project Assessment Form* and develop an acquisition and stewardship budget (short- and long-term). For projects that may represent new sanctuary lands, an SoWBA staff project leader shall work with sanctuary staff and others to complete the form.
2. The SoWBA Sanctuaries Committee shall review the *Land Project Assessment Form* and consider SoWBA project criteria, public benefit, and conservation values.
3. The board shall review and consider fiscal impact to SoWBA, including cost of acquisition in addition to annual maintenance and management costs.
4. The board shall review and adopt a resolution to approve the project concept and authorize staff to complete project due diligence (see section F). The board may reject the project and state the reasons for not pursuing the project. In either case, SoWBA will notify the landowner of this decision in writing in a formal *Engagement Letter*.
5. The staff shall present any critical issues discovered during due diligence to the board with a recommendation on next steps.
6. When the project has met all of the transactional steps outlined in this policy and any recommended next steps identified as part of the due diligence, the project shall be presented to the board for final review and approval.

B. Initial Site Inspection

SoWBA shall visit and inspect properties before purchasing fee title or easement, or accepting donations of land or easements, to ensure they meet the organization's criteria, to identify the important conservation values and public benefit of each property (see Public Benefit Analysis, section C, below), to identify any management-related problems that make it impossible for

SoWBA to proceed, and to identify other potential problems that need further investigation or possible mitigation prior to final approval by the board.

A *Site Inspection Report* template shall be used to prioritize the evaluation of key features of the property, including but not limited to: existing infrastructure, encumbrances, safety hazards, public use issues and access, hazardous waste, and adjacent land use. Subsequent site inspections may be needed to fully evaluate the property. SoWBA shall always invite the landowner on a site inspection, but staff may, with landowner permission, visit the property without the landowner.

C. Public Benefit Analysis for Land and Easement Donations

SoWBA should review every land donation, or interest in land for which a tax deduction may be claimed against the IRS Internal Revenue Code §170(h), a federal statute governing the requirements of a conservation easement and certain other partial interests in land to qualify for a federal income tax deduction. While SoWBA does not bear legal responsibility for seeing that IRS requirements are met, as a practical matter it benefits SoWBA and the larger land conservation community to ensure that they are.

SoWBA staff should analyze the project for the conservation purposes outlined in Internal Revenue Code §170(h) and provided below, and document outcomes on the *Land Project Assessment Form*:

How would the project meet at least one of the four categories of resources that qualify as conservation purposes by the IRS:

- i. the preservation of land areas for outdoor recreation by, or the education of, the general public,
- ii. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- iii. the preservation of open space (including farmland and forest land) where such preservation is
 - a. for the scenic enjoyment of the general public, or
 - b. pursuant to a clearly delineated federal, state, or local governmental conservation policy, and will yield a significant benefit, or
- iv. the preservation of a historically important land area or a certified historic structure.

If the project is considered to meet the open space criteria above (iii) how would the project yield a significant public benefit, according to IRS Regs 1.170A-14(d)(i)(A) and (B).

1. Uniqueness of property subject to easement to the area.
2. The intensity of existing and planned development in the area.
3. The consistency of proposed open space with public conservation programs in the region; including:
 - a. outdoor recreation,
 - b. irrigation or water supply protection,

- c. water quality maintenance or enhancement,
 - d. flood prevention and control,
 - e. erosion control,
 - f. shoreline protection,
 - g. protection of land area included in or related to a government master plan or land management area.
4. The consistency of proposed open space with existing private conservation programs in the area, as evidenced by other land protected by easement or fee ownership in close proximity to the property.
 5. The likelihood that development of the property would lead to degradation of scenic, natural or historic character of area.
 6. The opportunity of the public to use property or enjoy its scenic values
 7. The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce in the area.
 8. The likelihood that the donee organization will acquire equally desirable and valuable property or property right.
 9. The cost to donee of enforcing the easement.
 10. The population density in the area of property.
 11. The consistency of the proposed open space with a legislatively mandated program identifying specific parcels for future protection.

D. Communication with Landowners

Landowners who work with SoWBA to protect their property shall be informed about the process to complete a project. SoWBA shall provide clear communication, both verbally and written. The following content shall be provided to landowners in writing and, depending on the type and complexity of the project, can be prepared in one letter or separately during the process, but prior to closing.

- *Independent Legal Advice.* SoWBA shall refrain from giving specific legal, financial and tax advice to landowners and shall recommend in writing that each party to a land or conservation easement transaction seek independent legal counsel.
- *Tax Code Requirements.* SoWBA shall notify the potential land or conservation easement donor who may claim a federal or state income tax deduction, or state tax credit, that the project must meet the requirements of IRC §170(h) and accompanying Treasury Department regulations and/or any other federal or state requirements.
- *Appraisals.* SoWBA shall inform potential land or easement donors of the IRC appraisal requirements for gifts of property for a qualified appraisal prepared by a qualified appraiser.

SoWBA staff and volunteers who meet with the landowner to discuss the project shall strive to document details of the visit, including who met with the landowner and for what purpose.

During the acquisition process, the landowner shall be provided with the following:

1. An engagement letter that outlines the process for land or easement donation or sale. Templates of these letters may be modified as needed:

- *Engagement Letter for Sale of Property*
 - *Engagement Letter for Sale of Easement*
 - *Engagement Letter for Donation of Property*
 - *Engagement Letter for Donation of Easement*
 - *Engagement Letter for Bargain Sale*
2. *A Property Donation Appraisal Review Notification Letter* for a gift of land or conservation easement. The letter shall advise the landowner that he or she is required to get a separate appraisal to qualify for the IRS tax deduction. SoWBA will include IRS form 8283 with the letter.
 3. *Just Compensation Letter*, which details the fair market value of the property.
 4. A purchase/donation agreement for the property.
 5. *Land Gift Acknowledgment Letter* following closing for complete or partial donations. These provide acknowledgment of the value of the gift and detailed instructions on completing Form 8283.

E. Conservation Easement Drafting

SoWBA staff or representative shall draft a conservation easement. Templates are available from the Wisconsin Department of Natural Resources' or Land Trust Alliance. SoWBA shall provide careful consideration for permitted uses and reserved rights that are enforceable and based on conservation values and public benefit. An attorney may be asked to review all easement documents as deemed appropriate.

The SoWBA *Easement Enforcement Policy* contains additional information regarding drafting conservation easements, with attention to creating conservation easements that are precise and thus avoid misunderstanding and the potential of misunderstandings and violations.

F. Due Diligence

1. Title Investigation

The purpose for title investigation is to ascertain that SoWBA negotiates with the legal owner(s) and to uncover any liens, mortgages, mineral or other leases, water rights and/or other encumbrances, deed restrictions, or other matters of record that may affect SoWBA's ability to protect the conservation values of the property. Completion of title investigation should precede that of other due diligence items.

- a. *Acceptable Documentation of Title Investigation*. Acceptable documentation must include one of the following provided by a professional title company or attorney (LTA Accreditation Commission):
 - Title insurance commitment
 - Title insurance policy
 - Title opinion
 - Title report or title abstract
 - Copy of the above title investigation from a non-profit or government partner

- i. Conservation Easements. If a conservation easement is to be donated, the landowner will ordinarily be responsible for paying the fees associated with acquiring acceptable documentation of title investigation. If a conservation easement is being purchased, SoWBA will ordinarily pay the title investigation fees.
 - ii. Fee-land. If SoWBA is going to acquire property in fee, either through donation or purchase, title insurance covering the full land value is required. This protects SoWBA from any loss sustained because of defects in the title other than those specifically excluded in the policy. This insurance will ordinarily be purchased by SoWBA.
- b. *Encumbrances*. Conservation easement properties under consideration that are found to have mortgages, liens, or other encumbrances that could undermine the conservation values of the property, and that could lead to the extinguishment of the conservation easement, shall be subject to further review or rejection. Conversely, those properties under consideration with encumbrances determined not to undermine the conservation values of the property, will be deemed ready for board approval (assuming other project selection criteria are met) with those encumbrances properly subordinated to the conservation easement, where necessary. Examples of title encumbrances subject to further review include:
- Mineral leases or severed mineral rights
 - Mortgage
 - Agricultural leases
 - Ingress and Egress easements
 - Utility easements
 - Ownership structure
 - Deed restrictions
 - Railroad, street or other rights-of-way
 - Home equity lines of credit

2. Appraisals

Purchasing Land. SoWBA must be able to justify the price paid for land and easements for several reasons: to show fiscal responsibility; to avoid private inurement or excess private benefit; to substantiate prices paid in a changing market; to avoid inflating market value; to avoid losing money on resale; and to be prepared in the event of a condemnation action.

SoWBA shall obtain an IRS-qualified independent appraisal of the open market value of any property when SoWBA is considering buying land, easements or other real property. The cost of appraisal shall be paid by SoWBA. The board shall also consider whether to require a second appraisal or appraisal review for particular projects, as deemed appropriate. In limited circumstances when a property has a very low economic value or a full appraisal is not feasible before a public auction, SoWBA may choose to obtain a letter of opinion from a qualified real estate professional. In limited circumstances when acquiring above the appraised value is warranted, SoWBA shall document in writing the justification for the purchase price and ensure

there is no private inurement or impermissible private benefit. If negotiating for a purchase below the appraised value, SoWBA shall ensure that its communications with the landowner are honest and forthright, and document to the landowner the appraised value in writing.

Donated or Bargain Sales: If the landowner(s) plans to seek a tax deduction for the value of the land being sold or donated:

- Obtaining an appraisal by a qualified appraiser to determine the value of the charitable gift of land or easement, including bargain sales, is generally the responsibility of the donor, not SoWBA. SoWBA will notify the landowner of this and other requirements by sending an *Appraisal Review Notification Letter*. The closing must occur within 60 days of the effective date of the appraisal.
- SoWBA shall ask the donor for a copy of the appraisal and shall not knowingly participate in a project where it has significant concerns about the validity of the appraisal.
- Staff shall review donor's appraisal for IRS requirements, as outlined in the document *Appraisal Requirements for Gifts of Land and Conservation Easements*.

3. Property Boundaries

SoWBA should know as precisely as possible the boundaries and acreage of the land. If it is recorded, a survey provides a public record of the boundaries of the property.

- For conservation easements, a survey is necessary if the owner does not already have one and if there is uncertainty or disagreement about where boundaries locations.
- For fee title, SoWBA should commission a survey if one does not already exist. In certain cases, SoWBA may decide to take a calculated risk to accept some ambiguity about property boundaries when the cost of a survey is high or when the risk to the property is low if presumed boundaries are found to be incorrect. For example, SoWBA may decide to proceed without a survey if adjacent land uses will not in the foreseeable future threaten the conservation values of the property.
- SoWBA may use a survey from the landowner.
- If SoWBA is acquiring an easement that covers only part of a larger parcel, it should obtain a survey delineating easement boundaries, unless the area can be identified with certainty by reference to an existing survey and governmental survey subdivisions or maps, photographs, or prominent natural features.
- If an easement contains restrictions that are specific to certain zones or areas within the property, the locations of these areas shall be clearly described in the easement and supporting materials and be identified in the field.

4. Environmental Hazards

SoWBA takes steps, as appropriate to the project, to discover the presence of any potentially hazardous environmental conditions located on property that it is considering acquiring prior to deciding to acquire the property involved. This is important not only because of the

environmental risks that hazardous waste contamination poses, but also because of legal and financial problems that SoWBA could face if it acquires an interest in contaminated property, regardless of fault.

To address the possible presence of hazardous waste contamination on property of acquisition interest, the SoWBA shall:

- Complete an initial environmental assessment for every tract of land in which SoWBA is proposing to take a legal interest as part of its initial *Site Inspection Report*. If this assessment indicates the possibility, or obvious presence, of hazardous or toxic material or conditions, the staff shall provide information for a board of directors' decision a) to cease further acquisition steps, or b) to proceed with a professional environmental site assessment (Phase I and possible Phase II), or c) other actions, and any associated costs.
- The board will review outcomes of the environmental site assessment and approve next steps. SoWBA may ask the seller to pay the costs of the additional environmental assessment actions required and the costs of remediating the identified environmental hazards. In the event the seller or donor declines to pay these costs, the board will exercise its discretion to cease or proceed with the acquisition, taking into consideration the conservation values of the property, the identified costs inherent in the acquisition and the potential for the discovery of additional hazardous waste contamination and associated required remedial actions. SoWBA may obtain legal counsel to review proposed actions.

G. Legal Review

Attorneys or specialists who review SoWBA projects should have appropriate training and experience. Any single person may not be qualified to help the land trust with all its transaction needs. The board shall determine the appropriate level of legal review for each land transaction.

A qualified board member, who is willing and able to represent the legal interests of SoWBA and who has relevant experience in conservation easements and land transactions, may provide this function. This board member would be responsible for advising the board whenever additional legal help is needed. SoWBA shall ensure that it avoids any private inurement or excess private benefit to the board member per its *Conflict of Interest Policy*.

Documents that may need legal review include:

- Title Investigation review
- Option and/or Purchase Agreement
- Survey
- Phase 1 Environmental Assessments
- Project Closing Documents
- Conservation Easement

H. Baseline Documentation Report

SoWBA shall ensure that a *Baseline Documentation Report* (BDR) is completed by knowledgeable and experienced persons.

BDRs created after LTA Accreditation shall include the following items. BDRs created prior to LTA Accreditation will include at minimum items 2-6 and 11 below.

1. The authorship and qualification and/or experience of the baseline preparer
2. Date of completion
3. Location
4. Property description
5. Conservation values and public benefit with related maps and photos
6. Documentation of existing conditions related to conservation easement restrictions and reserved rights, including written descriptions with related maps and photos for items such as improvements, and data that would influence the exercise of reserved rights.
7. Well-defined maps that:
 - a. Clearly show the property boundaries, azimuth mark, scale, and date the map was created.
 - b. Contain location of features relevant to the enforcement of the easement, such as existing improvements, roads, buildings, fences or gravel pits, vegetation and rare species, land use history, and distinct property features.
 - c. Contain special use areas, such as building envelopes, protected riparian zones, forest management zones, etc.
8. The BDR will be a stand-alone report separate from (not including) the conservation easement document, and will not be recorded.
9. A baseline map of key property features should be included in the BDR and recorded in black and white (grayscale) as an exhibit to the conservation easement.
10. Other information that would make the material admissible as a business record in court, such as an indication that the record was created at or near the time of the event rather than later in anticipation of litigation.
11. Dated signatures of the landowner and SoWBA stating that both attest to the accuracy of the information contained in the report.

I. Post-Closing

Following closing, SoWBA shall:

- Ensure deeds and conservation easements are recorded in a timely manner at the appropriate records office according to local and state laws.
- Provide written *Land Gift Acknowledgment Letter* to landowner donor (for donated fee land or conservation easement, including bargain sale transactions) that is compliant with the Internal Revenue Code and Treasury Department Regulations.
- Ensure closing statements are processed into accounting records.
- Update all documentation according to *Recordkeeping Policy*.
- With board approval, pursue property tax exemption on fee title acquisitions.

Approved by the Board of Directors on April 3, 2017.