

Authorization of Real Estate Transactions

Rules and Process for Nonprofits

Within the bounds of state law and private standards of practice, nonprofit organizations have considerable flexibility in establishing policies and procedures regarding the authorization of real estate transactions.



State Laws and Standards	1
Pennsylvania Law	2
No Requirement for Member Approval or Supermajority	2
Board Approval.....	2
Assets Restricted to a Specific Purpose.....	2
Transfer of All or Most Assets	3
Approval Procedures under Bylaws	3
Resolution for Adoption at Board Meeting.....	3
Consents Without a Meeting.....	3
Delegation to a Committee	4
Bridging the Information Gap.....	4
Fully Negotiated Contract	4
Approval in Stages.....	4
Crafting Resolutions for Adoption.....	5
Delivery Prior to Meeting.....	5
What Is the Board Being Asked to Authorize?.....	5
Who is Authorized to Sign Documents?	5
Closing Certificate.....	6

STATE LAWS AND STANDARDS

State laws such as Pennsylvania’s require governing board authorization of real estate transactions and specify what constitutes authorization. In addition, [Land Trust Standards and Practices](#) specify best management practices regarding [land trust](#) approval of land and easement transactions. Within the bounds of law and Standards and Practices, a nonprofit corporation has substantial room to establish policies and practices best suited to its organizational character and the nature of its real estate transactions.

Standard 3, Practice D.1. of [Standards and Practices](#) (2017 edition) states the following:

The board reviews and approves every land and easement transaction. However, the board may delegate decision-making authority on transactions if:

- i. It establishes written policies or has bylaws provisions that define the limits to the authority given to the delegated entity
- ii. The delegated entity provides timely notification in writing to the full board of any completed transactions

Standard 3, Practice C.4. calls for providing “board members with sufficient and timely informational materials prior to each meeting to make informed decisions” on matters at hand including real estate transactions.

State laws may be more or less restrictive than these practices.

The rules regarding obligations of nonprofit governing boards vis-à-vis real property transactions vary by state. Although much of the guide’s content—developed in the context of Pennsylvania law—has relevance nationwide, readers should be careful to apply the laws of their states in their organizational policies and actions.

PENNSYLVANIA LAW

No Requirement for Member Approval or Supermajority

Title 15 (Corporations and Unincorporated Associations) of the Pennsylvania Consolidated Statutes, as amended by [Act 67 of 2013](#), provides the following in §5546 entitled “Purchase, sale, mortgage and lease of real property”:

Except as otherwise provided in this subpart and unless otherwise provided in the bylaws, no application to or confirmation of any court shall be required for the purchase by or the sale, lease or other disposition of the real or personal property, or any part of the real or personal property, of a nonprofit corporation, and, unless otherwise restricted in section 5930 (relating to voluntary transfer of corporate assets) or in the bylaws, no vote or consent of the members shall be required to make effective such action by the board or other body. If the property is subject to a trust, the conveyance away shall be free of trust, and the trust shall be impinged upon the proceeds of the conveyance.

Prior Law

Prior to September 7, 2013, Pennsylvania law required, in certain circumstances, a 2/3 majority of the board and, unless otherwise provided in the bylaws, the membership of the organization, to approve real estate acquisitions.

Law As of September 7, 2013

The 2/3-majority requirement is not applicable to transactions approved after September 7, 2013. **Approval of real estate transactions is governed by the bylaws** of the nonprofit corporation just like any other transaction. **Unless the bylaws provide otherwise, no approval of the membership of the organization is required** to authorize real estate transactions.

Board Approval

As a general rule, any transaction outside the ordinary course of business of the organization must be brought before the board for approval. Acquisitions of land and easements fall into this category for most land trusts.

The bylaws of the organization govern the procedures for approval, but the minimal legal requirements are that:

- Board members have a right and responsibility to be informed of the benefits and risks of accepting the asset; and
- **The board, as a whole, must make a reasonably prudent decision on behalf of the organization whether to accept ownership of land or responsibility for enforcement of an easement.**

The bylaws usually provide guidance as to what kinds of transactions may or may not be entered into by officers without the need for *further* approval. In the usual case, board approval is required but membership approval may sometimes be required as well.

Assets Restricted to a Specific Purpose

Whenever charitable assets are the subject of a transaction, the careful organization will check its corporate records to see if the property is the subject of any special protections under applicable law such as a transfer of property that was donated to the organization to advance a specific charitable purpose. For example, if a donor donates land to an organization for the express purpose—communicated in writing—of the land being used in perpetuity as a nature preserve, the land most likely will be considered to have been donated for a specific charitable purpose. If, however, the land was donated without any donor-imposed restrictions as to its use and the organization did not make any commitments as to its perpetual use as a preserve, the gift is unlikely to be found to have been donated for a specific charitable purpose.

If an asset is restricted to a specific charitable purpose or if there is question about whether it is, the organization should consult with legal counsel to determine the appropriate course of action.

Attorney General

Transfer of assets dedicated to a charitable purpose may require notice to the Attorney General for the Commonwealth of Pennsylvania, who acts on behalf of the public's interest to ensure that money or property donated or committed to a charitable purpose is properly administered.

Orphan's Court

Pennsylvania law also provides that the Orphans' Court has jurisdiction over property committed to charitable purposes.

Board Approval of Acquisition

Because transfer of an asset restricted to a specific charitable purpose can be problematic, the careful practitioner will inform the board whether or not any charitable restrictions have been, or will be, imposed on the gifted property in advance of the board being asked to approve the acquisition of the asset.

Board Approval of Disposition

The board will want to condition its approval of a sale or other disposition of a restricted asset upon obtaining such further approvals as are required for the sale or other disposition of the charitable asset under Pennsylvania law.

Transfer of All or Most Assets

A transfer of all or substantially all of the assets of a non-profit corporation, for example, if the corporation is in the process of dissolution or a major restructuring with another organization, is governed by §5930 of Title 15, the exception to the general rule set by §5546 described above.

¹ Physical presence of directors at the meeting is not necessary so long as the directors can all *bear each other, and their expression of consent or dissent*, by conference telephone or other electronic means (including the internet). 15 Pa. C.S.A. §5708. (Emphasis added.)

APPROVAL PROCEDURES UNDER BYLAWS

Resolution for Adoption at Board Meeting

An important function of all bylaws is to set the procedure for the governing body (usually a board of directors or trustees) to consider and approve (or reject) proposed transactions. The procedures must allow the board members to receive all information that is necessary and relevant to assist them in carrying out that responsibility and must allow the board, as a whole, the opportunity to make a reasonably prudent decision on behalf of the organization. Absent other alternatives that may be addressed in the bylaws, that requires presentation of a resolution to the board at a regularly scheduled meeting at which a quorum (the minimum number of directors required to conduct business) is present.¹

Consents Without a Meeting

Board approval may be obtained by written consent, but all of the directors in office (not just a quorum) must sign consents and return them to the secretary for filing in the minutes.² The consents may be transmitted by telefax, e-mail or other electronic means.

The ability to obtain requisite consents by electronic means may be helpful when quick action is needed, for example, at the end of the due diligence period when quick action is needed to decide whether to proceed or not. The unanimity requirement, however, creates a risk due to the impossibility of predicting whether all of the directors will be available to sign and return the consent. The two-step strategy discussed in the following section seeks to avoid that uncertainty.

² Unless otherwise restricted in the bylaws, any action required or permitted to be taken at a meeting of the directors may be taken without a meeting, if a consent or consents in writing setting forth the action so taken shall be signed by all of the directors in office and filed with the secretary of the corporation. 15 Pa. C.S.A. §5727(b).

Delegation to a Committee

If permitted by the bylaws, delegation to a committee can be a useful tool to allow the board to approve a transaction before all of the information needed to make a prudent decision is known. See “Approval Based on Limited Information and Delegation” below.

Standing Committee

The bylaws may permit the board to delegate decisions as to a certain class of real estate transactions to a permanent committee identified in the bylaws (often referred to as a “standing committee”) that is part of the governance structure of the organization.

Ad Hoc Committee

Whether or not standing committees are authorized to act on behalf of the organization, the bylaws may provide the board with the latitude to appoint a committee from time to time (called an *ad hoc* committee) to exercise specific authority delegated to it in the board resolution by which the *ad hoc* committee was formed.

BRIDGING THE INFORMATION GAP

Fully Negotiated Contract

As discussed above, board members need adequate information to discharge their duty to make an informed decision on behalf of the corporation. When the material terms of the transaction have been set before board approval is requested, the board is in a position to exercise its discretion, approve the transaction at a regular meeting at which a quorum is present, and authorize the proper officers to do all things necessary for the transaction to be completed in accordance with approved terms.

Approval in Stages

At times, the board may be asked to approve a transaction before all of the material terms of the transaction have been fully negotiated. More often, the board approval is obtained at a time when all of the information produced

by the due diligence investigation may not be available. The strategies discussed below may be used (if and to the extent permitted by the bylaws) to facilitate obtaining requisite approvals of the transaction as information is developed.

Tentative Approval Followed by Ratification

The board may tentatively approve a transaction so as to permit its authorized representatives (either certain officers or an identified committee) to negotiate and, exercising their reasonable business judgment, enter into a purchase agreement on behalf of the organization subject, however, to a condition for board approval of the fully negotiated contract within some period of time following execution. The board then has the option to ratify or reject the fully negotiated contract.

Conditional Approval

The board may approve a transaction on condition that the yet to be negotiated terms fall within certain parameters; for example, the agreed upon purchase price does not exceed a specific maximum or a value to be verified by appraisal. Representatives of the organization (officers or board committee) are directed in the resolution to continue negotiations and, if the missing term(s) fall within the parameters, enter into the transaction on behalf of the organization (without further approval). If the negotiated terms do not fall within the parameters, the matter must be returned to the board for further action.

Approval Based on Limited Information and Delegation

The board may approve a transaction based on then-available information and delegate to a committee the authority to make such changes and take such actions as the committee, in its reasonable discretion, determines are necessary or desirable. Material information may not come to light until the end of the due diligence period when critical decisions—proceed with the transaction, or not, and under what re-negotiated terms—must be made quickly. A committee of board members authorized to

make these decisions on behalf of the entire board can facilitate prudent but speedy decision-making on behalf of the corporation.

CRAFTING RESOLUTIONS FOR ADOPTION

Delivery Prior to Meeting

If a project is being presented to the board for approval, the authorizing resolution should be included in the agenda items delivered to the board members prior to their meeting. The resolution should either be prepared by the board member responsible for governance issues (usually the secretary) or be approved by the member prior to delivery.

What Is the Board Being Asked to Authorize?

A well-crafted resolution should include the following key points:

Description of Transaction

The description of the transaction does not need to be detailed but should include basic information such as: location, acreage, conservation values, anticipated investment of organizational resources, funding sources, and potential risks.

Consistent with Policy

The offered resolution should inform the board whether the acquisition is consistent with the policies of the organization and, if not, what aspects are at variance with policies.

Ongoing Negotiation

Documents that may be made public—board minutes, board resolutions, etc.—should be limited to stating only the necessary facts; they should avoid detailing opinions regarding property values or negotiating strategies that may undermine the organization’s negotiating position if viewed by others.

If a transaction is being approved prospectively but is still under negotiation, it is important to spell out who is authorized to make final decisions: Is it necessary to bring the fully negotiated transaction back to the board for approval? May a committee—either a standing committee such as the executive committee or an ad hoc committee formed for this purpose—approve the final terms? Are there constraints on that authority? Is it appropriate to delegate complete authority to the executive director or another staff member?

Further Decisions

During the due diligence period, who will review and evaluate the due diligence reports? If title, survey, or environmental problems or risks are uncovered, who in the nonprofit has authority to exercise rights of termination (and perhaps lose the deposit)? Is someone authorized to negotiate a lowering of the purchase price in response to these problems or risks? The resolution should address these questions. There is usually no time to convene a special meeting of the board and, unless covered by the initial resolution or delegated to a board committee by the bylaws, no one may have clear authority to act on behalf of the organization.

Who is Authorized to Sign Documents?

Authorized Officer Needed

In Pennsylvania, documents to be recorded must include the signature of a duly authorized officer of the corporation.

Attester is Not Signer

Pennsylvania law in the past required an *attestation* by the secretary or assistant secretary of the organization. As a result, corporate resolutions sometimes mistakenly elevate the secretary from an attester to a signatory, authorizing “the President and Secretary or Assistant Secretary” to sign. The safest verbiage is “the President or any officer”—don’t even mention the secretary.

Number of Signers

A phrase such as “the President and any Vice-President may sign on behalf of the organization” means that two persons must attend closing and sign documents. Do not use “and” unless that is the desired result. If only one officer’s signature is desired, and the intent is to widen the scope of possible signers, use the word “or” as the connector; for example, “the Executive Director or any officer....”

Titled Staff Members May Not be Officers

Nonprofit organizations use a variety of titles to describe various staff positions. The executive director may run the organization but, if that position has not been officially proclaimed an office, either in the bylaws or by adoption of a board resolution pursuant to authorization in the bylaws, the executive director is not authorized to sign documents on behalf of the organization. A resolution authorizing the president or the executive director to sign may be sufficient if the bylaws allow the board to create other offices besides those named in the bylaws and the resolution is understood to appoint the executive director as an officer (at least for this transaction).

Transfer of Signing Power to Others

Officers may not delegate their power to sign documents to those not properly authorized to sign under the governing documents of the organization. A common misconception is that an officer, such as the president of the board, can sign a power of attorney to authorize someone else to act for him in his capacity as officer when he is unavailable. That doesn’t work in Pennsylvania and many, if not all, other states.

Vice President

Bylaws are usually written to authorize the vice president to act for the president. If the bylaws do not address this but state nothing to the contrary, the vice president is authorized by Pennsylvania’s Non-Profit Corporations Statute to act for the president in their absence. Thus, if a board resolution specifies that the president must sign, the

resolution may be effectively authorizing the vice-president as well.

CLOSING CERTIFICATE

At the closing, delivery of a certificate by the secretary or other authorized officer of the organization is typically required by the title company (and may be required by the seller, purchaser, or donor as well) to furnish assurance that the transaction has been duly authorized by all requisite action on the part of the governing board of the organization.



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