

Setting the Ground Rules for Contributions of Real Estate

A written policy can guide a charity's thinking as well as its actions.

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The telephone rings and a prospective donor offers a "valuable" piece of real estate—worth far more than a typical contribution—to the executive director of a charity. The director's immediate impulse is the same that anyone else in the same position would have—to jump at the gift.

As many charities have learned the hard way, however, that is the wrong approach. It has subsequent problems for countless charities and true nightmares for some. Consider the questions that it leaves unanswered:

- Does the charity have enough information to be confident of the property's value?
- Does it risk any liability by accepting a property?
- Will it incur any expenses if it accepts a property?

- Can the charity quickly sell a property and convert it to cash?
- Will there be ongoing expenses to maintain the property?
- Are there any "strings" attached to the gift?

These and similar questions should be asked before a charity accepts a gift of real estate. The charity must protect itself from accepting property that could adversely affect it financially, ethically, or from a public relations standpoint. The dilemma is how to approach this issue without offending a donor and how to decline a gift without losing a friend of the charity.

The best way is to establish policies and procedures for accepting gifts of real estate before the telephone call comes in. That will make it easier to determine whether the gift would be an asset or a potential liability. Having written policies for evaluating and accepting gifts of real estate provides several benefits by:

- Minimizing the risk of environmental liability arising from ownership.

- Reducing the possibility of offending wealthy donors and other contributors, since decisions will not be made on a "case-by-case" basis.
- Decreasing the risk of having planned giving efforts dominated by politics or by strong personalities or departments.
- Satisfying increasingly vigilant board members that there are operational gift acceptance policies that will protect against lawsuits.
- Providing a checklist to make sure all the questions that need to be asked are asked.

REAL ESTATE GIFT POLICY

The charity's policy should start with one firm point—it cannot accept a gift of real estate without first inspecting the property. The primary reason for this inspection is to make sure there are no visible environmental hazards on the property. It will also disclose whether there are any other barriers to the property's marketability or potential sources of embarrassment (the charity could

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probably do without becoming the owner of a crack house, for example). Taking photographs to show the board will help them get "the lay of the land" as well, and so make a preliminary decision about whether to pursue the gift.

The policy should also require that a prospective donor provide relevant information regarding the property, including:

- A survey.
- A legal description.
- The names of any co-owners and their ownership shares.
- A copy of recent tax statements, including appraisals.
- Information on any current leases or contracts outstanding on the property.
- A brief description of the current use of the property.

A prospective donor who is unwilling to provide this information or allow an inspection of the property is waving a red flag that the charity needs to see. It would be best to thank such a donor for the generous offer, but inform him or her that the charity cannot accept the offer under the circumstances because doing so would violate written policy.

If the donor is willing, still more questions need to be asked. For example, is the donor planning an outright gift or are there conditions, stipulations or obligations? Once again, with a written policy in place, it will be easy to walk away if too many or the wrong kinds of strings are attached.

One string might be a requirement that the gift be used to fund a charitable remainder trust (CRT). A charity that does not have a planned giving program should consider developing a policy that spells out the steps that would have to be taken if a planned gift were offered. Some charities retain a planned giving

consultant or legal counsel specializing in estate planning so they can take advantage of an un solicited planned gift.

Whether the gift is planned or outright, the charity needs to know the details of any debt encumbering the property, and should decide in advance how much debt is acceptable. It is especially important here to define how and when to obtain assistance from a real estate professional to evaluate the property and its marketability.

Other questions that will arise as consideration of the gift moves along—and which will have to be foreseen in any successful written policy—include the following:

- Who in the charity will actually approve the gift?
- Who will pay the costs associated with a contribution of real estate?
- Will it be the charity's policy to sell any land received as a gift as soon as possible? If so, donors should be made aware that the charity will immediately market the property.
- Will the charity insist on a preliminary title report and, when appropriate, a standard title insurance policy covering the gift's value, a survey, or other report on the property?
- When may exceptions to policy be made and who has authority to make them?

Before the charity accepts the gift, there will be still more details that should be foreseen by and included in a written policy, such as:

- Will the charity staff use an "inspection checklist" to make sure it gets adequate information on the property when it is inspected? If so, what will this checklist in-

clude? Who will make the inspection?

- For improved properties or properties with buildings, will the charity hire experts to inspect the mechanical systems and structure?
- A current independent appraisal and preliminary title report should be obtained, typically at the donor's expense, to confirm value and ownership of the property. (The charity should also advise the donor to comply with IRS Form 8283 reporting requirements for gifts of real estate in excess of \$5,000 in value.)

Then there is the question of the property's environmental condition.

ENVIRONMENTAL CONCERNS

The issue of environmental liability is so significant that it merits a separate section in a charity's policy manual. The charity could become jointly and severally responsible for part or all of the cost of cleaning up another party's contamination of the property—no matter how hideous—under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by Super Fund Amendment and Reauthorization Act of 1986 (SARA). It should therefore be the policy of any charity that it will not accept gifts of real estate that could result in liability for environmental contamination under CERCLA and SARA or other such legislation that may be adopted in the future. A charity should have a procedure for reviewing potential environmental liability in connection with every parcel of real estate that is proposed for donation.

Many charities require that a

Level I Environmental Site Assessment be performed on any piece of real estate before it can be accepted as a gift. Other charities require an environmental site examination on all potential real estate gifts and a Level I Assessment on certain types of property found to be at higher risk for contamination. Because charities are not exempt from liability if contamination is found (even if the property was donated), the potential liability warrants as strict a policy as the charity's board will allow.

A charity should, at a minimum, have a policy that it will require an environmental site examination on any potential gift of property and should send a letter to the prospective donor requesting information needed to determine whether a Level I Assessment is warranted. Policies should also provide for the preparation, by the charity, of a "Prior Uses Questionnaire" that will be distributed to potential donors to assist in gathering information to help the charity evaluate the property. The charity should work with legal counsel to prepare an appropriate questionnaire.

If a charity does not require a Level I Assessment on all properties proposed for donation, it must have policies in place for "next steps" if a questionnaire or site examination raises concern. Typically, a Level I Assessment should then be required.

It should go without saying that if a Level I Assessment determines there is possible contamination, the charity should have a policy stating whether it will immediately decline the gift or whether it would agree to move on to a Phase II and possibly a Phase III Assessment. The costs of these are typically borne by the proposed donor, but this should also be stated in a policy. Another neces-

sary policy is that a charity would never accept real estate on which contamination had been found unless all required assessments were performed, all contamination was removed, and written statements attesting to both were obtained from

all involved governmental and regulatory bodies.

MANAGING REAL ESTATE

Once a charity has accepted a piece of real estate, the gift has to be

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managed until it can be sold. This should not be a major concern if the property is unimproved, but it will be a significant issue if the site is being used for residential, commercial, or agricultural purposes. Most charities do not have sufficient expertise in real estate management to manage such properties themselves, and therefore must retain someone who does. The written policy to be formulated should describe how the charity will oversee and evaluate this work. Because property management will cost money, the policy should also dictate whether the costs will be borne by the donor, the charity, or both (and how they will share the burden). The charity should also decide in advance what kind of reporting it will require from the property manager.

Until a piece of property is sold, the charity will also be responsible for taxes, maintenance fees, and insurance. These costs

will have to be dealt with as the management costs were.

DISPOSING OF REAL ESTATE

Assuming the property will not be used in furtherance of the charity's exempt purpose, the first decision a charity should make regarding the property's future is whether to put it on the market immediately. Having a policy to this effect makes sense because of the costs involved in holding and managing real estate. Moreover, real estate assets are risky investments and market fluctuations can be dramatic over relatively short periods. Additional policies should stipulate who will engage an individual or company to market the property for sale on behalf of the charity, how this process will be managed and evaluated, and who will approve the terms of any sale on behalf of the charity.

CONCLUSION

A gift of real estate is more complicated than, say, a gift of securities. Receiving such a gift raises a myriad of questions from big-picture issues to nuts-and-bolts details. Unless a charity's policy is always to say "thanks, but no thanks," it needs to consider these questions before the press of events forces precipitate decisions.

By having written policies in place, the leadership of a charity can feel comfortable that it has protected the charity and its donors when they accept gifts of real estate. Written policies will also give concrete reasons to reject some offers of real estate, keeping a charity from giving in to the urge to make decisions based on emotions or the charity's current financial situation. Moreover, establishing policies can enhance a charity's ability to accept gifts that truly further its charitable purposes. ■