

Canadian Network of
Community Land Trusts

LEGAL GUIDE

READING AND NEGOTIATING FUNDING AGREEMENTS FOR PURCHASE OF RENTAL PROPERTIES

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The [Canadian Network of Community Land Trusts](#) commissioned the creation of this legal guide. This guide should be considered **legal information**, not **legal advice**.

ABOUT NONPROFIT LAW ONTARIO

Nonprofit Law Ontario (NPLO) is a project through which the Ontario Nonprofit Network (ONN) provides legal education and training for public benefit nonprofits. This project was initially launched by Community Legal Education Ontario (CLEO) in 2013 and transferred to ONN in 2024. [Nonprofit Law Ontario](#) creates sector-driven collective solutions that help nonprofits and charities meet their legal needs through caring legal education.

ABOUT THE AUTHOR

Since 2017, Benjamin Miller (he/him) has worked on the Nonprofit Law Ontario project where he has tried to meet the legal needs of nonprofits and charities through clear, practical, and accurate education and information. In this capacity, Benjamin has developed and delivered dozens of workshops and answered thousands of nonprofit law questions. Benjamin articulated with and has worked as a policy officer for the Government of Canada in the past. Benjamin holds a Juris Doctor and Master of Public Policy from the University of Toronto and a Master of Arts in Political Theory from the University of Ottawa.

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Preface (Don't Skip!)

Disclaimer: Understanding What this Document Can and Can't Do

This Guide Can Offer You:	This Guide Can't Offer You:
General legal information	Legal advice that is accurate and perfectly suited to your situation
Information about typical contractual practices rooted in the author's experience in Ontario	Information specific to law in your province or territory
An overview of typical provisions in funding agreements for the acquisition of rental property	A comprehensive deep dive into the many provisions that may show up in the particular funding agreements you are dealing with
Insight into legal considerations in the decision of whether or not to pursue such agreements	Insights into all the other considerations (political, economic, cultural, etc.) that may drive your decision to pursue these funding agreements, and on what terms

Ultimately, after reading this guide you may still need to seek advice from a qualified legal, or other, advisor.

Introduction

As governments at all levels in Canada grapple with the affordable housing crisis, many have come to realize that the solution is not simply to build more housing. An effective response must also preserve existing affordable housing.

Towards that end, several governments have started funding nonprofit organizations, including community land trusts (CLTs), to purchase and maintain affordable housing. Examples of government supports that have been announced or rolled out to help nonprofits acquire rental properties include the [Canada Rental Protection Fund](#) (Federal); BC's [Rental Protection Fund](#); and Toronto's [Multi-Unit Residential Acquisition Program](#).

This guide is for boards and staff of CLTs who are considering applying to these types of funds, or who have already applied and been successful. In Part 1, we'll look at common provisions in funding agreements for the acquisition of rental property and explain in plain language what they mean for every step of your relationship with your funder, including:

- When you're in the process of purchasing a property;
- While you operate the property;
- When things go wrong.

In Part 2, we will go through some tips to help you negotiate terms that work better for *everyone* (you, your community, and your funder), and look at some illustrations of these tips in practice.

But, first things first: What do we mean when we say “funding agreement”?

What Is a Funding Agreement for Purchase of Rental Properties?

The term “funding agreement” is not a technical term; it could refer to a range of different legal relationships. Let's look at some of them:

- **Grants, contributions, or transfer payments:** Depending on the jurisdiction, any of these terms may refer to a situation where the funder is giving the funded organization a gift *on the condition that they meet certain conditions* relating to how that gift is used (e.g. maintaining affordable housing). If the funded organization fails to meet those conditions, then the funder often has rights to get part or all of their gift back.
- **Loans:** A loan is a legal relationship where a lender provides money or other property to a borrower on the condition that, on a certain schedule, the borrower will give the money or other property back to the lender, often for a fee called “interest”. A lender may take “security” for a loan. This gives them a

special right to take and/or sell some (or all) of the borrower's property until they have been repaid, if the borrower fails to repay the loan. A lender may also decide to forgive part or all of the loan under certain conditions, in which case the borrower does not have to pay the forgiven part of the loan back.

- **Mortgages:** A mortgage is a special type of loan in which real estate is taken as security. There are special laws in each province/territory that govern the terms of these kinds of loans. These laws set out a specific process when the borrower fails to repay on time.

Typically, funding for a nonprofit's operations and programs comes in the form of grants, contributions, or transfer payments. However, **when nonprofits are funded to acquire or build capital, such as a rental building acquisition, a large part of the funds (if not all) will be structured as a mortgage or loan.**

It is really important to understand that when you are signing a funding agreement to acquire rental property you are likely going to be entering into a **borrowing relationship**. If you fail to uphold the funding agreement your nonprofit will likely be on the hook to repay part or all of that original funding. If you cannot find another lender, this may mean you lose the rental property you acquired. In some cases, it could mean you are still liable to pay more.

This guide exists to help you understand what you are getting into so you can set realistic expectations around the terms you can live up to. You might accidentally violate an agreement if you don't fully understand what it says. This guide is also meant to help you negotiate better terms where possible.

Part 1: Reading Funding Agreements

Below, we will examine some of the provisions that show up in funding agreements of all kinds. These are often referred to as “boilerplate” provisions. Then, we will go through common funding agreement provisions, not in the order they appear in your agreement (since that changes), but grouped according to when they might affect your activities.

Introduction to Standard or “Boilerplate” Provisions

Below are just a few of the most common kinds of standard provisions. They’re sometimes put in by default, but we still need to think about them.

The Entirety of Agreement Clause: What Is and Isn’t Included in the Agreement?

“X represents the entire agreement between the parties with respect to the subject matter hereof and all other prior agreements, representations, statements, negotiations, and undertakings with respect to such subject matter are superseded hereby.”

Often there is a lot of back and forth between a funder and fundee before agreements are signed. There may be several stages of application in which information is communicated and promises are made. For example, BC’s Rental Protection Fund has a pre-qualification stage, an application pre-qualification stage, and a proposal stage. The funder may have sent you an initial acceptance letter with some of the essential terms of the agreement summarized. The standard Entirety of Agreement clause tells you how much of those previous communications and documents actually made it into the final agreement and will therefore bind the parties, and how much has been replaced by this final most official agreement. It will typically include the agreement and some appendices. It will not typically include all those conversations you had, and the initial letter will often be replaced.

TO DO: If you’re expecting something to show up in the final agreement, make sure it’s included in one of the documents referenced in the Entirety of Agreement clause.

Notice Clause: Here’s my Number, so Call Me Maybe?

“Unless otherwise provided in this Agreement, any notice, approval or other communication required or permitted to be given (“Notice”) shall be in writing and shall be personally delivered, sent by prepaid registered mail, or sent by email and, in the case of Notice to X, addressed as follows:”

Various provisions under the agreement will require both your funder and you to communicate in an official way. For example, if the funder believes you have breached the agreement, and wants to start exercising their rights under the agreement, this process will begin by giving you a certain amount of notice. Alternatively, you may be required to give notice to your funder of an event that has happened (e.g. a change in insurance).

TO DO: Provide the funder contact information that is less likely to change and notify them if it does. When communications could trigger consequences within your funding agreement, put them in writing and address them to the right office.

Uncontrollable Circumstances: What Could Go Wrong?

“Except as expressly provided for in this Agreement, no party shall be in default under this Agreement or liable to the other party for any loss, damage or delay to the extent it results from an uncontrollable circumstance if such circumstance is not caused by the default or act of commission or omission of such party or avoidable by the exercise of reasonable effort or foresight provided that nothing excuses a delay caused by lack of funds or other financial circumstances or excuses a party from payment of any amount payable hereunder when due.”

We live in unpredictable times and yet we have a duty to prepare. Especially as the effects of climate change become more pronounced across Canada, understanding what steps we are responsible for taking, and when it's truly out of our hands, is crucial to understanding what the worst case scenarios might mean for sudden shocks to our operations and our compliance with funding agreements. Additionally, some things that you may intuitively understand as outside of your control are so unavoidably built into the background of any contract negotiation that they are not considered exceptional circumstances that exonerate you of responsibility. A crucial example of this would be an economic downturn. The market has ups and downs, and contracting parties are expected to plan for this.

TO DO: Learn about health, environmental, and other standards that housing providers are expected to meet to prepare for “uncontrollable” circumstances like pandemics and natural disasters. Be prepared for shocks that may not be in your control but may be considered so typical as to be unexceptional.

Contractual Status of the Parties: You're Responsible!

Funding agreements often take pains to emphasize that the fundee is the owner and is solely responsible for all aspects of operating the property as affordable housing. This sounds like exactly what the fundee wants, but it's important to understand that

the funder does this because it wants the fundee to hold all the liability (i.e. risk) for the project.

This ownership doesn't mean there are no strings attached. As we will discuss later, funders generally reserve for themselves various rights to veto important decisions (like borrowing from others, transferring the property, etc.) and even the right to appoint people to take control of the property if the fundee violates the agreement. However, agreements will also generally say that the funder is expected to be "reasonable" (or alternatively "not arbitrary"), so you can always hold them to that standard if they refuse.

TO DO: If your funder refuses to give you consent when you need to obtain it, investigate whether it was really "reasonable" for them to do this and consider pushing back if needed.

Purchasing the Property

Before you have even acquired the property, funding agreements can have a major impact on how you go about purchasing the property in at least three ways:

- Your timeline for purchase
- Your pre-purchase costs
- Your other sources of financing

Below, we will explore what impact your funding agreement could have on each of these.

Timeline of Purchase: One More Reason to Stress

Funding agreements may require you to have acquired the Property under question, or to have acquired additional funding (usually from other orders of government), by a certain date, or else you lose the funding, subject to the funder agreeing to change that deadline. In Ontario, a property is acquired when the agreement for purchase and sale is signed, not the closing date. If this timeline is too tight, not only could it jeopardize your funding, it could also needlessly impair your bargaining position vis-à-vis the seller.

TO DO: Make sure this date is realistic or you will be setting yourself up for failure. Seek modifications of the agreement as needed.

Additionally, pre-purchase and purchase funding will not generally be released to you directly. Instead, the "escrow agreement" which accompanies such funding agreements sets out the terms on which the money will be provided to your lawyer (not you directly), and the conditions on which the lawyer may release the money to

you. If the funder pays money to the lawyer early, it doesn't mean you are entitled to that money early. Furthermore, meeting the conditions in the agreement does not mean you should expect to immediately get the money from the funder. They will generally set out a period in the contract (e.g. 1–2 weeks) after you've met the conditions within which they will pay.

TO DO: Time your transaction in a way that accounts for the escrow agreement delays.

Pre-Purchase Costs: Legal Fees, Building Inspections, Oh My!

Funding agreements may cover, either by loan or grant, some amount of the pre-purchase expenses, such as inspections, legal fees, and more. An appendix to the agreement may require you to set out a detailed breakdown of these expenses. You will likely be required to provide receipts, invoices, and other proof that you've incurred these expenses after the fact.

TO DO: Be ready with cost estimates for pre-purchase expenses when applying for funding. Be careful to keep all receipts and invoices for such expenses.

Other Sources of Financing: The More the Merrier?

As we have already mentioned, funding agreements for the acquisition of rental properties are generally loan agreements. As a result, your funder's rights will generally impact your ability to find complementary financing elsewhere. Below, we will consider what the funder's rights may be and how they may affect your other potential lenders. This is crucial to being able to communicate with other lenders and plan your acquisition accordingly.

What is the difference between a charge and mortgage?

In contrast to an ordinary commercial mortgage agreement, under a charge (in this context sometimes referred to as a "forgivable loan") the funder does not necessarily expect you to repay them on a regular basis. Rather, in the case of a charge, the funding agreement says you owe some amount (typically the whole amount governed under the agreement less whatever part the funder is giving as a grant), and may be required to pay it all at once if you breach the agreement. Then, other provisions say the funder forgives the debt, bit by bit, until the affordability period for the property ends. For example, if the affordability period is 25 years, the agreement might say that the loan is forgiven at 4% a year. The funder registers what (in Ontario) is called a "charge", which entitles the funder, in case you break the agreement, to potentially seize the property and sell it to repay themselves what they are owed.

Funding agreements will generally require that you register the funder's interests on title. Registering their interests on title means going to the land titles office and filing paperwork saying that you owe the funder money and that the real estate is security

for the loan. These steps strengthen the funder's claim: registering their interests on title means the agreement will be binding on anyone else who acquires the property, if you ever break the agreement.

Funding agreements may also require a legal opinion testifying to various things. Funders may ask for this legal opinion because they want some degree of independent legal guarantees that certain procedures have been followed and standards have been met, without the funder personally having to undertake a costly and time-intensive audit or investigation.

TO DO: Be sure to budget the cost and work of registering the agreement on title, as well as any legal opinion requested by the funder.

How do the funder's rights interact with the rights of other lenders?

Funding agreements generally contemplate how the funder's rights will interact with other lenders you might have. For example, the funder may require that they have first priority as lender. In Ontario, this means that, in the event you break the agreement, they will have the first right to force you to sell the property to repay all your lenders; moreover, the proceeds of sale will go to the funder before any other lenders. This means that if you seek other lenders you will only be able to offer them second priority or lower. This is called the "secondary mortgage market." This is a greater risk for the secondary lender since it's possible the property will not sell for more than what the first lender is owed. Consequently, fewer lenders will be willing to deal with you, and other lenders will likely charge you more than the normal market rate.

In other situations, a funder may be willing to take a lower priority in order to incentivize other lenders (sometimes other orders of government) to the table. A funder may even be willing to switch priority, subject to later consent and discussion about who the other lender is. In either case, the funder may require that they approve any mortgage you obtain. They may actually enter into a separate agreement with your other lender, setting out various mutual rights and obligations if you violate either the funding agreement or that other mortgage agreement. This may give the funder the right to take over other mortgage agreements.

TO DO: Communicate clearly with other potential lenders about the relationship they may be required to enter into with your funder. Obtain the funder's consent, as needed, as early as possible to avoid wasting precious time pursuing lending relationships that are not feasible.

One way you can protect your mission in the agreement (even in a situation where you need to exit the agreement), is to require that, in cases where a mortgagee sells the property, they must prioritize an entity that agrees to be bound by the agreement.

For example, they could sell to a nonprofit that is aligned with your mission. A public funder may be open to this. It is unlikely that most private lenders will be.

Operating the Rental Property

The heart of the funding agreement includes the conditions under which you commit to maintain the property. Below, we will look at common aspects of operations that may be affected by funding agreements, including:

- Residents
- Finances
- Records
- Communications

While agreements try to create as much predictability as possible, inevitably, everyone recognizes that changes sometimes need to be made. At the end of this section, we will therefore also discuss “amendment” processes, i.e. how agreements are changed.

Residents

Attached as appendices to the funding agreement, the funder may specify various requirements in terms of how the property must be operated. The parameters of these plans are often the most flexible aspects of the funding agreements (within the scope of meeting the funder’s definition of affordability). This is important because things can obviously change once you have taken possession of the property, but the funding agreement will generally set out those things that the funder does not want changed without their written consent, including the following.

Division or Number of Dwellings

The funder may require that units not simply be dwelling rooms, to avoid funding rooming houses or short-term rentals. The agreement may also require that a minimum number of units be tenanted at all times. Such a requirement will be relevant in the event of major damage to the building or other major improvements or renovations.

Other Amenities for Residents

The agreement may set out certain requirements for amenities like parking spots. In some cases, maintaining these spots may be inconsistent with the CLT’s commitments to climate justice, and with the wishes of residents. Consequently, this may become a delicate point for negotiation.

How Residents are Selected

The funder may have a centralized system from which you will be expected to draw new tenants. Alternatively, you may have autonomy over selecting tenants, you may have designated referral pathways, or there may be some mixed arrangement. The

CLT's legal liability may be different depending on whether it is providing housing to those drawn from the funder's system or taking in residents on its own terms. You may also be asked to set out specific allocations of units for priority communities you serve, such as Indigenous individuals, seniors, recently incarcerated individuals, etc.

If there are current residents in an acquired building who would not qualify under the funding agreement conditions, it is important to ensure they are "grandfathered" in. Otherwise you may be caught between your obligations under the agreement and your obligations to them as a landlord, which may force you to negotiate with existing tenants and pay them a settlement to vacate.

Additionally, the funding agreement will likely disqualify some individuals, particularly employees or councillors of a funder as well as employees or directors of the funding applicant. (These terms may be subject to certain conditions that allow for co-operative governance structures.) For organizations wishing to hire residents or have residents serve on the board (as is common in CLTs!), it is important to read these provisions with care.

Internal Policies

The funding agreement may require you to develop and maintain various policies, such as a conflict of interest policy, an internal transfer policy, and others. You may also be required to comply with various policies of the funder (which are at their discretion to change), such as discrimination and harassment policies.

Conditions of Buildings

The funding agreement may require that you maintain the building in a good state of repair (or "tenantable condition"), but the agreement may not define that. You may be obligated to do so anyway under residential tenancy law in your province or territory. It's a good idea to research what this means. If you know that the property has particular issues that will incur perennial costs, it may be relevant to clarify with the funder what state of repair will be considered sufficient.

TO DO: Make sure your plans for how the building will be used, and for whom, align with your funding agreement obligations. Pay special attention to any obligations that may affect existing residents, if you are acquiring an already tenanted property. Create internal policies as needed.

Finances

Let us examine how various provisions in a funding agreement can significantly restrict your organization's future financial planning. Usually these restrictions also make your financial planning more predictable, but, as we will see, they can sometimes make your financial planning unpredictable and dependent on external

factors. Below, we will explore how the funding agreement may impact your income and expenses.

Income

The funding agreement will generally restrict your income for the length of the affordability period (which could range from 20–100 years) to:

- Affordable rents;
- Other charges within allowable monthly occupancy costs, such as. utilities, parking, etc.

How these terms are defined, and how they might change, is therefore crucial. For example, in BC, affordable rent is sometimes defined as:

“an annual Household Income that is at or below Low and Moderate Income limits published by British Columbia Housing Management Commission (“BC Housing”), or its successor in function, for the most recent year, provided that if British Columbia Housing Management Commission, or its successor in function, discontinues publication of the Low and Moderate Income limits, “Eligible Households” shall mean such other income threshold as agreed to in writing by the City from time to time.”

This definition makes your future planning subject to potential changes in policy at multiple levels of government. This may cause a financial shock for which you must be prepared.

What other services you are allowed to charge for, and any caps on those, may also be crucial to your financial planning. The funding agreement may also contain provisions regarding when you can increase these charges, by how much, and whether you need to obtain consent from the funder.

Expenses

The funding agreement will likely require you to incur various annual expenses, including:

- **Reserve fund:** Funding agreements will generally require that a capital and/or operating/contingency/liability reserve fund be maintained. Agreements may offer different formulas for required contributions, or for the size of that fund. This is often a negotiable point. The Canada Revenue Agency expects that nonprofits or charities have written policies in place explaining what funds in a reserve are being held for (e.g. future capital expansion, repair, liability, operations). These reserve policies can be good opportunities to engage in community wealth building activities.¹
- **Audit or other required level of financial review:** In Ontario, an audit can add \$15,000–\$30,000 to your annual expenses. Approving and appointing the auditor or financial reviewer must be built into your governance calendar.

¹ See Benjamin Miller, (Aug 8, 2023). Dear nonprofits: Dream big and grow your operating reserves. Ontario Nonprofit Network. Available at: <https://theonn.ca/2023/08/operating-reserves/>

- **Insurance:** The funding agreement will generally require you to keep different kinds of insurance to cover different kinds of risk, including:
 - **Property insurance** to cover risks to the building;
 - **Public insurance** to cover risks to the public.

It is important to ensure this insurance covers your obligation to indemnify other parties, like the funder. Note that the funding agreement may give the funder rights to veto your chosen insurance provider and obtain insurance for the property if you fail to obtain appropriate insurance.

The funding agreement may also make you responsible for less predictable expenses, such as indemnifying the funder. Indemnification means that the nonprofit agrees to cover the costs of the funder in the event that the funder is sued or incurs any other kind of harm or loss as a result of the agreement. Indemnification provisions may also set limits to the potential liability. It is important to understand the range of situations in which the funder is seeking to be indemnified, and the limits to liability—and to factor this into how you weigh project risks. Indemnification provisions should make clear that you are ultimately responsible for the property.

The funding agreement may also include exemptions from other expenses you would otherwise be liable for, such as land transfer tax and property tax.

TO DO: Make sure all your funding agreement obligations are accounted for in your financial planning.

TO DO: Some funders may be very invested in ensuring you continue to break even or run surpluses. It may be important to clarify realistic financial boundaries for your planning with your funder, particularly when it comes to the power to appoint a manager.

Records

Funding agreements will generally require you to collect, and in some cases share with the funder, sensitive personal information from residents, if only to confirm their income for the purposes of assessing their eligibility and access to ongoing benefits. As such, it is important that the nonprofit is prepared to comply with all applicable federal and provincial privacy law requirements. This includes the Personal Information Protection and Electronic Documents Act (PIPEDA), which applies to all provinces and territories except Alberta, British Columbia, and Quebec. The provinces not following PIPEDA each have their own provincial legislation that you might need to follow if you are in their jurisdiction.

There is a different set of rules that applies to the information once it is in the hands of a public funder, or the information that you collect on their behalf (e.g. the Privacy Act, the Municipal Freedom of Information and Protection of Privacy Act). You can learn more about privacy law in Canada by visiting the [Privacy Commissioner of Canada's website](#).

Funding agreements may add additional privacy obligations, such as restrictions on your ability to share tenant information with a third party without the consent of tenants. It is important to remember that third parties include other legal entities that may be associated with your CLT. There may be an associated foundation with whom you might want to share a resident list to serve as their members or to be eligible for scholarships, rent bank, etc. Another example is a partner agency that provides some services to residents.

TO DO: Create robust consent forms for residents to sign, including permission to share with relevant associated organizations. Do not forget to factor the cost of developing these into financial planning.

Communications

The funder may require that you acknowledge them in some or all of your public communications, or that you maintain signage with certain information. The agreement may specify the parameters of this acknowledgment or leave the discretion up to the funder to determine how they must be acknowledged. As you consider your CLT's image and reputation in the community, you may wish to set some limits around how extensive the acknowledgement must be.

TO DO: Ensure that obligations to acknowledge the funder align with your public image.

Changing the Agreement

You may wonder whether the funder is really going to hold you to absolutely every detail of the funding agreement. Agreements generally give them this ability. For example, agreements will generally say that "time is of the essence." This means that when the agreement sets out a timeline for you to do something, you have to do it completely by that exact time, or else you're in breach, unless the funder excuses you in writing.

In practice, however, funders vary in how strict they can be, depending on what impact any minor or technical breach might have, as well as how good your overall relationship is. But, it's important to understand that agreements generally include a provision that says that, just because the funder excused one of your breaches, this does not mean they will tolerate further breaches.

TO DO: Consider whether you are prepared to abide by the funding agreement down to the letter if your relationship with your funder sours. Imagine how things are likely to change in the future and build the possibility of those likely scenarios into the agreement from the beginning, wherever possible.

With the above being said, inevitably things change in ways you cannot anticipate as you experiment and learn. It is therefore important to realize that funding agreements can be changed by mutual agreement of the parties in writing. It's less common for funding agreements to attach a particular timeline to these amendments, since approval times can vary depending on the circumstances of the funder. Consequently, it is important to understand a bit of what the internal approval process would be like if you ever sought an amendment. For example, will it always have to go all the way up to the most senior official with the funder? Will the front-line program officer, with whom you have a personal relationship, have a level of discretion to approve certain kinds of changes? This information should inform the timeline of your board and staff's decision to go to the funder, relative to when the modification will be needed.

TO DO: Educate yourself about the funder's internal approval process for potential future changes.

When Things Go Wrong

In this section, we will consider what funding agreements generally tell you about what happens if things aren't going particularly well with the property:

- Your ability to transfer or assign the property to others (which you may need to do if you are no longer able to operate the property);
- The funder's ability to audit and investigate you;
- The funder's rights if they have found that you violated the funding agreement;
- Your (and the funder's) rights to seek an alternative resolution if you disagree with how the funding agreement is being interpreted.

As you'll see, funding agreements generally give funders **a lot** of power. We will therefore conclude this discussion by exploring the meaning of ownership under these agreements, in light of CLT values.

Transfers and Assignments

The funder does not want you to benefit from the funding, and then be able to simply transfer the property to someone else who won't be similarly bound or won't have the same intentions. To accomplish this goal, the agreement may have a surprisingly broad definition of "transfer", including a long-term lease to a community partner for a garden or solar panel, or an easement provided to a neighbour. Consequently, the funding agreement will generally contain rules about when and how you can transfer the property (in whole or in part) to other parties. The agreement may require any or all of the following:

- You obtain the consent of the funder (with the circumstances under which the funder will grant that consent);
- The purchaser/transferee of the property enters the same agreement;
- You pay a certain administrative fee;
- You allow for a certain time period.

These factors are important to consider in the event that you:

- Are winding down operations and want to transfer a property to a partner organization;
- Are looking to merge with an aligned organization; (The conditions of this agreement may drive decisions like whose corporation absorbs whose.)
- Are entering a partnership with another organization where you provide rights (e.g. a community garden, a solar panel on the roof) that would qualify as a transfer under the agreement;
- Are considering working with a for-profit developer leveraging airspace rights to enlarge the property for mixed use purposes.

TO DO: Before you start these major partnership conversations, it is a good idea to review the transfer and assignment parts of your funding agreements.

Audits and Investigations

Under corporate and tax law, you are expected to keep adequate books and financial records. Your funding agreement(s) may specify further requirements related to record-keeping. To save yourself time down the road, it is helpful to set these systems up as early as possible in the life of the organization. Records will generally need to be kept in a way where you can easily identify what revenues and expenses are attributable to the property subject to this funding agreement. Where you have shared services across multiple buildings, it is important to have a consistent and documented approach to how you attribute costs.

Funding agreements will generally give funders wide powers to access any books and records of the nonprofit, as well as the physical premises of the property, subject to any rights of tenants.

TO DO: It may be helpful to think through, with the funder, what an audit and investigation would actually look like in practice, and how to set parameters in the agreement that prevent any predictable issues. For example:

- What are the operating hours within which it would be reasonable to request access to the space?

- Are there any times during the year when such an investigation would cause particular stress (e.g. a culturally important time to the residents)? It may be possible to include a right to a delay during that period.
- Are there any protocols around who may access the space? For example, residents in housing specifically for those who have experienced violence at the hands of men may feel their private space particularly violated by a male investigator, if someone else could be sent.

Defaults, Termination Rights, and Clawbacks

The funding agreement will set out various circumstances in which the nonprofit is considered to have “defaulted” (meaning, violated the agreement). Here are some typical examples of when a funding agreement will be considered violated:

- Selling, transferring, or assigning the property without first obtaining the funder’s consent;
- Closing the nonprofit (e.g. dissolving, winding-up);
- Breaching the operating terms of the agreement (e.g. offering an apartment to someone who should not be eligible or charging too much);
- Providing false or misleading information to the funder;
- Committing fraud, criminal acts, or misconduct.

TO DO: Define vague default provisions. Words like “misconduct” may or may not be defined. Ask yourself: Who decides what constitutes misconduct? Could this label be applied to something our organization would be interested in doing, such as civil disobedience in protest? Consider asking the funder what they have in mind and adding clarifications to the agreement where appropriate.

Typically, a certain timeline will be provided in which the nonprofit can rectify the situation (e.g. 30 or 60 days). Understanding this timeline could be crucial when making financial plans in a crisis situation. If the nonprofit fails to rectify the situation, the consequences can be quite dire, including:

- You may be required to repay whatever part of the loan has not been forgiven (which may include interest);
- You may be required to repay the entire amount that was originally given;
- You may be required to appoint a manager or receiver to take over the property and run it according to the funding agreement; (Note: this person may be given wide powers to take property, revenue, assets, records, and more when managing the property, and the nonprofit remains liable for what they do.)
- The funder may send staff to make changes without going through the usual notice process;
- The funder may terminate the agreement;

- You may lose other benefits associated with the agreement, such as, in the case of a municipal funder, tax exemptions;
- You may be subject to a court order to take action that the funder deems necessary to rectify the breach of the agreement;
- You may be pursued in court for other matters related to the breach.

Dispute Resolution Mechanisms

The above consequences are quite serious. The good news is, the funder is not the final judge of when they apply. The funder's understanding of the agreement isn't law. Just because they say you have violated the agreement does not necessarily mean you have. As a result of this, funding agreements will often contain a provision discussing what will happen in the event that there is some disagreement over the interpretation of the agreement. For example, a funder may allege that the CLT engaged in misconduct or provided misleading information, whereas the CLT may argue that what they did, or the information they provided, was perfectly appropriate.

Generally, dispute resolution provisions will set out, in more or less detail, what process will or *could* be followed before anyone is allowed to resort to litigation. For example, the agreement may make disputes subject to the Arbitration Act of the relevant province or territory. If someone skips this step and goes straight to court, the court may reject their claim simply because they did not use all the available processes contemplated by the funding agreement. Litigation is time consuming and expensive, and agreements often provide that the CLT could be made to pay the legal costs that the funder incurs in trying to enforce their rights. Therefore, it is usually in the interests of the CLT to have a provision that *requires* as robust an alternative dispute resolution process as possible before the funder can resort to litigation.

TO DO: As appropriate, seek a robust dispute mechanism provision with mandatory language (e.g. “the Parties *will* attempt to resolve disputes in X way before seeking litigation...” as opposed to “the Parties *may*...”).

The Meaning of Ownership

It's worth briefly reflecting on what ownership of real estate means to a CLT, especially as we consider the long list of rights a funder might have to take back the full amount and/or appoint someone to take control of the property in question. Even if a funder were to take the above described steps, the CLT would technically still own the property. But, let us consider why CLTs seek to own land, for example, removal of land from the speculative property market, economic security for tenants, or autonomy to steward the land in a way consistent with CLT values. In contrast, the kind of ownership a CLT is left with under a highly prescriptive funding agreement could mean little more than the CLT holding the liability to operate what is essentially a funder's nonprofit housing program.

Some CLTs may reject this form of constrained ownership as mission drift. Others may consider signing onto highly prescriptive and restrictive funding agreements, reasoning that, even though they may not be aligned with the CLT's values during the life of the agreement, sooner or later the agreement ends and the CLT is left with a more full ownership. Others may be perfectly comfortable with these agreements, reasoning that they have no plans to violate them in the first place; the CLT feels assured that the agreement allows for anything they would contemplate doing. These very different attitudes can all be valid. What should be common to all of them is a strong understanding of just how extensive a funder's rights could be, even though the CLT may technically "own" the property. In the next section, we will discuss how to improve this situation, if only marginally.

Part 2: Negotiating Funding Agreements

When you apply for funding, and have been approved, you may be so happy that you're willing to sign any funding agreement without even reading it. This is likely compounded by the speed of the real estate market and the belief that any delay may result in you losing that property you have your eye on. Hopefully, after reading the section above, you realize how dangerous that can be, not only for the property you've been funded to acquire, but for your whole organization.

The good news is that funders actually want you to read the agreement. There are several places where, if something is not going to work, they want you to identify it; and they may be perfectly willing to find an alternative. Funders in this space generally also want to see affordable housing preserved. It is a waste of their time and money (as well as politically risky) to fund a project that flops because applicants weren't transparent about whether their plans met the funding criteria.

On the other hand, there is likely a massive power imbalance between a CLT and a funder. It would be foolish to talk about negotiating without acknowledging this reality. Just because a funder says they want to be open and are looking to act in an equitable way, does not mean their actions will necessarily match. Nevertheless, there is still room to improve agreements in ways that will be appealing to even the most risk-averse of funders without ever needing to be adversarial.

Is being adversarial with a funder really that bad?

Not necessarily. There may be times when it is entirely appropriate to be adversarial, when you have decided it is necessary for the pursuit of your mission. This guide assumes that one of the main reasons nonprofits of all kinds don't negotiate more is for fear of being perceived as adversarial. Some of this fear may be based on a real risk of lost funding, while some of it may be exaggerated self-policing. Either way, it is not possible for this guide to assess the risk involved in adversarial negotiation strategies in particular situations. For that reason, we focus on non-adversarial strategies relevant to the widest cross-section of CLTs.

In this section, we will explore:

- Different kinds of negotiating strategies;
- Reasons why funding agreement negotiations so easily devolve into adversarial bargaining that many fundees prefer to avoid it altogether, and strategies to move towards a more collaborative approach to negotiating;
- Some illustrations of the lessons above.

Different Types of Negotiating Strategies

Perhaps the biggest reason why any nonprofit does not try to negotiate for a better funding agreement is that they are worried the funder will perceive them as difficult-to-work-with troublemakers, and will move on to another funding application. This fear, while grounded in valid experience, nevertheless assumes that negotiating must be a kind of adversarial activity that will rub a funder the wrong way.

The truth is, there are many different approaches to negotiating that we may not even recognize as negotiating. In *Negotiation: A Very Short Introduction*, Carrie Menkel-Meadow introduces four kinds of negotiation.² These different frameworks can be summarized as follows:

1. **Distributive-adversarial-competitive:** “when the resources being negotiated are limited and must be divided (e.g. money, land)”;
2. **Integrative-problem-solving:** “where the sharing or expanding of resources or creation of new arrangements or solutions may allow for joint gain for all parties, usually with shared information”;
3. **Compromising or cooperative-relationship preserving:** “when the relationship of the parties may be more important than the substantive outcome...”;
4. **Mixed situations:** “where a negotiation setting may allow some problem solving and resource expansion, which then must be allocated...”

If we can find ways to negotiate in an integrative-problem-solving way (what could be called “collaborative”), most funders will not be aggrieved; they will appreciate the efficiencies resulting from this kind of dialogue.

Process Factors That Encourage Adversarial Negotiating, and How to Overcome Them

If collaborative negotiating is so great for all involved, why do funding agreement negotiations so often devolve into adversarial confrontations? It’s not for lack of imagination or because of some personality traits of the negotiators (though these may be at play). Rather, there are several factors common to funding agreement negotiation (across jurisdictions) that predictably lead to adversarial bargaining. Below, we will look at five such factors and strategies to overcome them:

- Exaggerating how inflexible agreements are;
- Focusing only on money;
- Anticipating artificially tight timelines;
- Having the wrong people in the room;
- Concealing negotiating objectives.

² Menkel-Meadow, Carrie. (2022). *Negotiation: A Very Short Introduction*. Oxford, UK: Oxford UP at pg.11.

Exaggerating How Inflexible Agreements Are

Issue: The front-line staff you are dealing with (and keep in mind there may be high turnover for that position) may not understand in detail what parts of the agreement they're presenting you with are:

- Legally mandatory to include;
- Up to the discretion of senior staff in consultation with counsel;
- Up to their discretion.

Without realizing it, they may be assuming a greater part of the agreement is mandatory than is actually the case.

Strategy: By understanding the difference between template and law, and therefore understanding what provisions are mandatory, you can help inform your counterpart on the funder's side. For example, the City of Toronto's Multi-Unit Residential Acquisition Program is subject to regulations created under section 257 in the City of Toronto Act as well as by-law 713-2024. Whatever you agree to cannot contradict these regulations or this by-law. For example, the by-law defines what must be included in the agreement (section 7):

1. The term of the agreement;
2. That the agreement must meet the by-law's definition of affordable housing;
3. That monthly occupancy costs must follow the by-law's definitions;
4. That units must be made available to tenants following the by-law's stipulated process;
5. Other provisions that the City Solicitor and Executive Director of the City's Housing Secretariat deem necessary.

While items 1 to 3 are pretty inflexible, item 4 includes the possibility of the City relying on the nonprofit's own waiting list, giving the nonprofit the flexibility to define its own policies about how that list is managed. Item 5 clearly shows that much of the agreement is up to the discretion of the City, but this will involve getting internal buy-in from the Solicitor and Executive Director's offices. Similar programs in British Columbia are subject to requirements under section 483 of the Local Government Act in conjunction with local bylaws, which will also give you a sense of what the funding agreement must contain and what it cannot change.

Focusing Only on Money

Issue: Bargaining more easily becomes adversarial when it's about a single item and that item is something finite like money. You can avoid getting overly focused on money by expanding the number of items you are seeking changes in at any one time.

Strategy: The more factors there are, particularly non-monetary factors, the greater the variety of potential solutions to balance these various factors.

For example, rather than just negotiating a global number for pre-purchase fees, you can talk about different quotes from law firms, inspectors, and other pre-purchase suppliers. This can allow you to have a more fulsome conversation about your shared priorities to put more funding into certain kinds of services over others.

Additionally, as alluded to throughout this guide, there may be several parts of the agreement that you would prefer to have defined or clarified. No dollar amount necessarily attaches to these clarifications upfront, so this can be easier to ask a funder. Down the road, narrowing what constitutes “misconduct” or clarifying what is meant by “good state of repair” could save you a lot of money.

Having the Wrong People in the Room

Issue: Generally, funding agreements will require that the board has authorized the nonprofit to enter into the agreement. Sometimes funders will request a copy of this board resolution. Agreements won’t necessarily require that the Board has clearly authorized the individuals responsible for negotiating the terms of the agreement (except the person who will sign the final agreement).

When there has been no clear delegation of authority to an individual (e.g. an executive director and/or president) or to a committee (e.g. a capital committee), this can lead to needless delays. The individual may need to report back to a board which communicates by email or waits to call a meeting; this can also lead to miscommunications that needlessly impair your negotiating position even further.

Strategy: Before an organization begins applying for funding, it can establish which officer (e.g. president, chair, executive director) or committee would hold responsibility for negotiating such funding agreements. This can be set out in the bylaws or constitution, as well as in employment contracts. It should be consistent with what is required or allowed by corporate and employment law in its jurisdiction. Such job descriptions or committee terms of reference should make clear what level of decision-making falls to those individuals and what decisions need to be brought back to the full board for its approval.

At least in Ontario, pretty much all decisions that might relate to such a funding agreement could be delegated to officers, employees, or committees, unless the governing documents specifically prohibit this. Therefore, when recruiting for these positions, the board should look for people whom they would trust to represent the organization effectively in such negotiations under time pressures when they cannot bring it back to the whole board without risking losing an opportunity.

It is generally a good idea to have more than one person attending such funding negotiating meetings, and empowered to negotiate. If one person becomes incapacitated or indisposed, it should be possible to continue negotiation without interruption. However, where multiple people are appointed to represent the organization, especially where it's an even number, a clear written policy should explain how disagreements between these individuals will be decided.

Anticipating Artificially Tight Timelines

Issue: Funding application processes for the acquisition of rental property may require that you already have a specific property in mind. As a result, there is an inherent time pressure with funding agreement negotiations, which often follow a lengthy funding application and decision process. Meanwhile, the intended property is often just sitting on the market for other prospective purchasers to acquire; or you may have entered into an agreement of purchase and sale with a short due diligence and closing period. This time issue alone is often why nonprofit purchasers lose out to other bidders.

Consequently, it is very tempting to gloss over shortcomings in the funding agreement in the name of simply moving forward as quickly as possible. Perversely, the bigger the issue with the agreement, the less incentive there is to bring it up, because doing the work necessary to solve it may result in delays that cause your organization to lose the property.

Strategy: There are two basic strategies to relieve time pressure on your negotiations and thereby maximize the creativity and potential for improvement in a funding agreement:

1. Dispel the false sense of necessity.

It may be true that there is a more or less real deadline on a particular building for sale, as you compete with other bidders. But a funder has also invested a lot of effort to get to the point where they are negotiating a funding agreement with you. If there are other similar building prospects for which you've done some groundwork, then you can negotiate with the confidence that, if an initial building falls through, your work won't be entirely lost. You can apply the same framework to another of your options.

2. Find more time before the deadline and make more use of it.

Having the right person in the room, who is sufficiently empowered to negotiate substantial issues, will in itself help to minimize delays. This will also increase the range of issues that may be resolved, even if there is a hard limit on your time. Here are some tips for getting as much done as possible within that time period:

- **Allocate a realistic amount of time to meetings.** If the funder offers you a 30 minute meeting, consider pushing for 60 minutes. If the funder offers you 60 minutes, consider pushing for 90 minutes. These are small costs to the funder in the grand scheme of things, but it's amazing what 30 minutes can do for a group's imagination on a limited set of issues, or a group's capacity to tackle more issues.
- **Have a clear, written, and goal-oriented agenda for meetings.** If the funder does not set an agenda (and maybe even if they do!), take this opportunity to offer one yourself. Next to each item, attach an objective you are seeking to leave the meeting with. This can lead to more productive discussions.

Concealing Negotiating Objectives

Issue: Sometimes funding applicants don't really meet all the qualifications that the funder is looking for. In these cases, they may take pains, from the beginning of their application, to crowbar their proposed project into terms that the funder says they are willing to fund. As a result, there is an element of concealment from the beginning—open and honest conversations about the fundee's real needs become difficult. Consequently, the CLT may wish to identify issues in the funding agreement, but may not be willing or able to explain fully to the funder why such a change is needed. This situation does not make for effective or collaborative negotiating.

Strategy: Avoid applying for funding you may not really qualify for. This will allow you to be transparent. It will strengthen your hand in negotiating since you can be more confident that you and your funder share objectives. Ultimately it will protect against mission drift.

Examples of Strategies to Move Towards a Collaborative Approach

Let's look at a few illustrations of what some of these strategies might look like in practice and how they all support each other.

Example 1: Negotiating Judo, Beyond the Bottom Line

Example Land Trust (ELT) is a BC-based CLT applying for a local housing agreement with their municipality, as well as a mortgage through the Rental Protection Fund (RPF), in pursuit of a former motel that recently went on the market. Both the municipality and RPF have fixed amounts of support per affordable unit, so they will not negotiate on the level of contribution. However, each funder is open to ELT taking on a private mortgage and may even give it priority under certain circumstances. Rather than play broken telephone, ELT leverages the greater resources and expertise of the funders to negotiate directly with a private lender for better terms to allow them priority. As a result, ELT obtains a larger mortgage.

Example 2: Pivoting Quickly, Not Losing Momentum

Unfortunately, a private purchaser manages to purchase the motel before ELT has the chance to put in an offer. At the same time, the Executive Director has resigned for personal reasons. However, ELT now has a significantly better understanding of both the municipality and RPF requirements; and the Treasurer of the Board was at all meetings with the Executive Director. From the beginning, ELT has kept its eye on several properties of interest simultaneously, with support from an experienced and trustworthy realtor. It has variously delegated responsibility for research and communications with each property so that no single employee or volunteer is too overwhelmed. Under these circumstances, ELT is capable of determining, with greater certainty, which of the alternatives are most likely to be successful and to fit into the framework ELT has already developed with the funders. ELT has a clear internal process to appoint a temporary successor for the ED without interrupting negotiations.

Example 3: When Sending it Up the Line Is Worth It

ELT continues to negotiate with the municipal funder. One sticking point has emerged relating to eligibility for units. The agreement contemplates making units available to diverse and priority communities, but does not go into detail about how these communities are defined. ELT is led by Indigenous youth; an essential value is control over issues of eligibility. Initially, the municipal official responsible for negotiating the agreement is insistent that no element of the definitions section can be modified. Through a detailed review of the Local Government Act and municipal by-laws, ELT is able to show that, while certain terms must be defined in the agreement, there is nothing to prevent the inclusion of other definitions. There is enough flexibility within the by-laws definition of diverse groups to allow for deference to ELT's process of defining eligibility.

Conclusion: Some Thoughts on Collective Negotiation

We certainly hope that, after reading this guide, you have a better understanding of funding agreements for the acquisition of rental properties. We also acknowledge that the speed of the market, the power imbalance between you and the funder, and the sheer urgency and precarity of your work may make all these details seem more like luxuries to think about than tools you feel empowered to make use of.

If you're left with that feeling, then the question remains: how can we move negotiations from the fringes of agreements to their core? And how can we make funders responsive to the people whose benefit they seek to promote, as opposed to vice versa?

Building power in the face of public and private funders is essentially a political question. While we have neither the ability nor the space to articulate a broader vision, it is clear that such power cannot be built in isolation, or one agreement at a time. Where CLTs, other housing nonprofits, and their allies identify windows of opportunity to collectively negotiate (e.g. a generation of mortgages coming due within a certain period), there are opportunities to pursue genuinely collective solutions beyond what any individual CLT could achieve. Recent end-of-mortgage negotiations by the co-operative housing sector are examples of this. We therefore urge all CLTs to continuously communicate with and learn from one another. Although many funding agreements have confidentiality provisions, there are always ways to meaningfully communicate shared concerns together.