



Conservation Easement Agreements: Best Practices for their Successful Management

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OLTA Conservation Easement Defense Strategy Working Group
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Introduction

We have prepared this document to help land trusts manage conservation easement agreements to minimize the potential for conflicts and to respond effectively if a compliance problem arises. It is one part of a broader strategy to create a collective defence approach that will put land trusts in a strong position to deal with challenges to conservation easement agreements that may occur. It reflects the wisdom culled from a range of existing research documents and the real-life experiences of individuals on the ground.

We look forward to your comments and suggestions for improvements. We invite you to send your feedback to Alison Howson at: alison.howson@olta.ca.

Acknowledgements

This document was researched and written by Bob Taylor-Vaisey, Kawartha Land Trust, and the Ontario Land Trust Alliance's Conservation Easement Defence Working Group, composed of the following:

Alison Howson, Ontario Land Trust Alliance (OLTA)
Marie Michele Rousseau-Clair, Nature Conservancy of Canada (NCC)
Ian Attridge, Kawartha Land Trust
Jeremy Collins, Ontario Heritage Trust (OHT)
Vicki Schmolka, Land Conservancy for Kingston, Frontenac, Lennox & Addington
Bill Lougheed, Georgian Bay Land Trust
Mark Bisset, The Couchiching Conservancy

Additional input was gratefully received from: Travis Allan, Ontario Land Trust Alliance, Kristie Virgoe, Oak Ridges Moraine Land Trust, Susan Walmer, Oak Ridges Moraine Land Trust, Patricia Short-Gallé, Oak Ridges Moraine Land Trust, Lisa McLaughlin, Nature Conservancy of Canada, Laura Kucey, Ecological Gifts, Canada Wildlife Service -Ontario.

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1.0 General Guidelines

These general guidelines will assist a land trust in determining whether or not it faces a violation of a Trust-held conservation easement agreement and if so, how it could respond.

General principles:

1. Use good models and write clear documents.
2. Build good landowner relations.
3. Plan for transitions in land ownership.
4. Put policies in place before violations occur.
5. Seek legal advice in drafting and enforcement.

With regard to the above, the following can help to minimize the potential violation of conservation easements through education and relationships:

1. Regular communication to discuss issues the landowner may be having.
2. Regular review of easement restrictions.
3. Assistance to the landowner where possible to strengthen the "conservation partnership" concept. (e.g. owner is having an issue with invasive species and land trust organizes a team of volunteers to help with control).
4. Educate local realtors about how an easement binds property in perpetuity.
5. A land trust can also reach out to sellers and their realtors when it learns of an encumbered property listed for sale. This reinforces with landowners (who may be sellers) the real property restrictions contained in conservation easements.
6. Modern conservation easements require landowners to notify potential buyers that a property is encumbered by a conservation easement. Some older conservation easements do not have this notification language.
7. Modern conservation easements also require landowners to notify a land trust before properties are sold, which gives land trusts the opportunity to educate buyers about conservation easement limitations. If a seller neglects to tell a land

trust about a property changing hands, a land trust can still learn of new owners when checking ownership records for upcoming monitoring visits and begin establishing working relationships with the new owners.

The further an easement passes down the line from the original grantor to subsequent property owners, the greater seems the chance that the new owners will ignore the terms of the easement. There is still too little experience with easements to generalize as to whether or not this is true. Nevertheless, experienced grantees take extra steps to educate new landowners about the nature of the conservation easement agreement on the land to avoid conflicts.

1.1 What Kinds of Violations Can There Be

1. **Initiated by the landowner:** any change to the application of the CEA by a landowner, his/her successors, employees or tenants or a new owner. In this case any existing documented experiences would suggest that the first generation landowner is not generally regarded as a threat, whereas successors in title might be.
2. **Initiated through trespass** (accidental, incidental or deliberate): the premeditated and deliberate intent to use a conservation property for commercial gain by a 3rd party causing irreparable damage to the property (e.g. clear cutting a stand of forest) or, incidental or accidental use of a property resulting in damage to the property, by an abutter, or 3rd party commercial interest

NOTE: not all violations become the responsibility of the land trust; in some cases, if a landowner becomes aware of damage done to the property (e.g. partial destruction of a fence), the landowner can deal with the issue in compliance with the CEA without necessarily alerting the Land Trust. These guidelines do not deal with this instance of remediating damage to a property in the normal course of a landowner complying with the conditions of the CEA, nor in cases of trespass unless the interest of the land trust has been compromised.

1.2 Preventing A Potential Violation

Conservation easement agreements should allow for ongoing communication with landowner once the agreement is in place and provide for a planned, regular review of the conditions and limitations of the CEA with the landowner, with, at a minimum, an annual monitoring visit to the property. This should limit the occurrence of both inadvertent and deliberate actions on the part of the landowner.

2.0 Identifying A Violation

2.1 Issue Identification

Gather and document as much information as possible from the initial source or sources. Potential violations can be found during site visits, review of aerial photography, conversations with land trust staff, landowners, buyers, realtors, neighbours, etc.

2.2 Discovery and Initial Evaluation

Determine the extent of the issue. This must be done as quickly as possible so that any emergency actions that may be necessary can be taken promptly.

2.3 Initial Assessment

Make an initial assessment of whether an issue is a potential violation by comparing the facts of the situation to the conservation easement terms.

If it is determined that no violation has occurred, report back to the person who alerted the land trust to the issue to explain why the issue is not a violation, and no further action needs to be taken.

If it is determined that a violation appears to have occurred, make an initial determination of the severity of the violation by comparing reported facts to the conservation purposes of the conservation easement and assessing the degree of damage that the violation has caused or may cause, and whether the situation requires action.

In either case, the assessment must be documented in the file.

2.4 Detailed Investigation and Assessment

Conduct a detailed investigation of the issue as quickly as possible to confirm a violation has occurred and to identify its severity. There is no deadline because it is important to gather all necessary facts about the situation, unless the resources protected by the easement are in imminent danger of irreparable harm. In this case, the immediate implementation of the following steps is recommended.

2.4.1 Investigation

Contact the landowner to discuss the situation and confirm all facts. The first attempt to contact the landowner should be by phone, and then by email or letter to the landowner requesting an opportunity to discuss the situation and obtain more details.

Gather and document all available facts:

1. Typically during a site visit to observe and take photographs of the situation.
2. From other sources as appropriate, including neighbors and any other complainants.
3. From the conservation easement language.
4. From information contained in the property's baseline documentation report.
5. From other sources that establish the property's prior condition, monitoring reports, maps and aerial photographs of the property's current and prior conditions, photographs documenting the differences between the property's former and current condition, title reports, etc.

2.4.2 Severity Assessment

Evaluate the issue by comparing the confirmed facts to the conservation purposes and other terms of the conservation easement to reassess the severity of the violation in the context of restrictions documented in the conservation easement agreement. For example, the severity of violations can end up in one of three categories ranging from the determination that no actual violation occurred, or that it was technical in nature, to a sliding scale of severity (minor, moderate, major):

Category 1: No Actual Violation

Sometimes what initially appears to be a violation may turn out not to be one after the foregoing investigation has been done. Document this for the file.

It is possible that a situation may not clearly be either an allowed use or a violation of the conservation easement. This may be due to insufficient information about the issue, in which case, the land trust should continue to pursue the necessary information so a severity assessment can be made.

If the conservation easement language is so ambiguous that a determination cannot be made, the land trust should proceed to discuss the language with legal counsel before deciding how to proceed.

Category 2: Technical

Technical violations have no tangible physical impact, and normally do not require action or immediate action. For example, a land trust may learn that a landowner failed to obtain a building permit for a building that is allowed under the terms of the conservation easement and that was placed in an approved location.

This may violate terms requiring land use approval, but the conservation easement purposes remain intact.

Or, a landowner may have failed to notify the land trust of a new address.

Category 3

Key to this category is the factors influencing a decision as to severity, and the level of reaction required. For example, does a landowner show a history of non-compliance with the restrictions in the CEA? Is non-compliance driven by an inconsistency in the restrictions noted in the CEA or, their inconsistent application? Are the impacts fundamentally related to conservation?

Generally:

Minor. Minor violations are not central to the conservation purposes of the conservation easement and only minimally impact the property's conservation values. These may not require action if the property's conservation values are not permanently damaged.

- For example, a landowner may hold an allowed wedding on a property where foot and vehicle traffic from visitors causes grass vegetation to be trampled. This would be a violation since conservation easements aim to protect vegetation, but it would only be a minor violation if the grass recovers rather quickly.
- If that scope of use is ongoing, and continued use would negatively impact the property's conservation values, the violation could change from having a minimal, transitory impact to a more serious long-term impact.

Examples of minor violations:¹

- Construction of insignificant structures
- Construction of permitted structures without prior approval
- Inappropriate stockpiling or composting
- Minor dumping
- Minor unpermitted disturbance to natural areas
- Activity in violation of setbacks.

Major. Major or severe violations have significant negative impacts on the property's conservation values, are difficult to mitigate or reverse, and are potentially permanent. Major violations may require immediate, emergency action; and sustained action over time.

Examples of major violations:²

- Alteration of terrain
- Prohibited cutting of vegetation

¹ Drawn from a 1999 LTA US Land Trust Survey and from Guidelines for conservation easement violation response Brandywine Conservancy", undated, Ontario conservancy

² Drawn from a 1999 LTA US Land Trust Survey and from Guidelines for conservation easement violation response Brandywine Conservancy", undated, Ontario conservancy

- Construction of prohibited structures (construction of residences or other buildings that are not allowed by the terms of a conservation easement, construction of allowed buildings outside of a designated building envelope in areas that negatively impact the property's conservation values)
- Prohibited timber harvest
- Alteration of wetlands/waterways
- Construction of substantial prohibited structures
- Destruction of natural features protected by the easement
- Major dumping/depositing of waste
- Destruction of historic integrity.

2.4.3 Actions Leading Up to Legal Consultation

1. Known or new situation, land trust has managed something similar before. No need for legal advice.
2. A land trust may seek legal consultation on minor, technical and moderate violations, but typically handles those without need for legal counsel, because most issues that arise have occurred before and a land trust may have legal precedents or procedures on file.
 - a. New situation including where the easement seems to be at risk with some issues not familiar to the land trust. Legal advice or lawyer's letter may help in this situation.
 - b. Immediate action required (e.g. an injunction) to stop something destructive to habitat from happening or to stop more from taking place. Legal consultation is highly recommended.

If issues or fact patterns differ enough from past situations that staff decides that additional advice is needed, legal counsel should be consulted to address the violation and preserve the land trust's conservation easement interest in the property.

At some point, the land trust may decide to contact legal counsel for the appropriate municipality, particularly if the conservation easement violation also violates zoning or land use regulations.

2.4.4 Enforcement Follow-up

As mentioned above, some violations (minor, technical or handled by a landowner) may not require enforcement of any action. In all cases, there should be follow-up with the landowner to ensure that these processes work in more important situations, and to avoid violations in the future

When enforcement is necessary, the land trust should identify appropriate actions in an expeditious manner based on informed decisions about appropriate enforcement.

And, whether any enforcement action is required or not, document the entire decision-making process for that file, and future similar occurrences.

Written Notice to Landowner

It is preferable to maintain positive working relationships with landowners by interacting informally as much as possible. If those efforts fail to garner the landowner's cooperation, or if the land trust deems it otherwise appropriate, then the land trust can invoke the formal notice provisions of the easement to generate an appropriate response.

If the landowner is unresponsive, the land trust should continue to repeat the notice one or more additional times. If a conservation easement violation also violates zoning or land use regulations, the land trust and the appropriate municipality should collaborate to notify the landowner in writing about the violations.

Mitigation and Correction

Even after written notice is given, the land trust should attempt to work with the landowner to resolve the situation amicably and restore the property to its former condition (i.e., work with the landowner to identify ways to mitigate impacts and negotiate a resolution that best preserves the property's conservation values.)

Enforcement Decision

The land trust now makes an enforcement decision that is most appropriate for the situation. Resolutions can include, but are not limited to:

No Action

Legal counsel may advise that that a land trust not enforce an issue. For example, enforcement may not be appropriate if a use is not allowed by the conservation easement but existed on the property before the conservation easement went into effect and the use was not properly described in the easement or baseline documentation report.

Restoration

In some cases, the violation can be corrected and the property can be restored to its prior condition, thereby protecting the property's conservation values and preserving the conservation easement purposes. For example, debris dumped on the property can often be removed without causing any long-term impacts to the property.

Mitigation

Sometimes the damage caused by the violation needs to be mitigated by creating enhanced conservation values elsewhere on the property or by replacing the damaged property in a manner that affords equal or more valuable public benefits.

Payment for Damages

If the property cannot be restored and no other resolution that preserves or enhances the public benefits is found, the landowner may be required to pay damages and costs to the land trust in recognition that the property's conservation values have been permanently damaged.

An additional action may be follow up of various sorts, even if there is no change to the impacted lands. Follow up could include: enhancing communication channels and procedures, more frequent monitoring, coordination with others, etc.

2.5 Final Actions

2.5.1 Documentation³

The land trust documents the resolution fully. It may also issue a compliance letter about the violation having been rectified; however, it is recommended that a land trust not issue letters acknowledging full compliance with the conservation easement terms and rather limit any compliance letter to the specific issue that has been rectified.

In situations requiring clarification, the land trust may consider opening the conservation easement agreement to strengthen the wording of restrictions and eliminate ambiguities. An update to the baseline documentation report may also be required. Note that any such amendments are subject to the requirements of the Conservation Land Act.

2.5.2 What Mitigating Activities Could Be Used to Avoid Legal Action?

The Conservation Easement Agreement - Preventative

Strong legal drafting of the conservation easement agreement, including provisions that enable communication and strengthen defence strategies. These may include: advance notice provisions, ways to calculate damages and enforcement costs, mediation and arbitration procedures, monetary penalties and rent charges, etc. Registration on title of the complete conservation easement agreement documents.

Baseline documentation - Preventative

In 2006, the Ontario Heritage Trust and OLTA developed “The Baseline Documentation Report, A manual to assist in the preparation of BDR’s for natural heritage properties and natural heritage conservation agreements in Ontario”.

A comprehensive BDR fully documents the state of the property at the time the conservation easement is signed as well as providing the land trust with an opportunity to determine, on a risk assessment basis, for the easement agreement:

³See the seminal work, *Easement Revitalization. A Problem Solving Guidebook for Land Trusts*, Solid Ground Consulting, 2011

- Potential violations and abuses (the most likely vulnerabilities)
- Nature of the impact of a violation
- Costs of restitution.

Awareness and Communication - Preventative

If the potential for violations against an easement are more likely when the landowner changes (within a family, or to a 3rd party), then the risk is higher if the 'new' landowner is not informed of the conditions of the CEA upon the landowner taking care and custody of the property. For easements that do not have a notice clause, the land trust should consider the design and enforcement of a protocol that would mandate such a communication as part of the transfer of ownership.

Ongoing Property Monitoring - Detective

Regular monitoring visits (at least annually) and conversations with the land owner reduce the possibility of violations and sustained damage to a property.

Land trusts need to establish, for each easement property:

1. the frequency and time of year of monitoring;
2. the monitoring route(s);
3. the information to be gathered during a monitoring visit;
4. the categories of characteristics against which the monitoring is measured;
and
5. the format of the report after each monitoring visit.

2.5.3 Litigation

If the steps described above do not resolve the violation, or if the land trust deems a violation to require immediate action to prevent additional damage to the property, it may choose to pursue enforcement of the conservation easement by legal means, such as injunction, temporary restraining order or other remedy for relief, such as damages.

3.0 EcoGift Properties

3.1 First Step

For any violation of a conservation easement agreement which has EcoGift status, review the EcoGift Program guidelines on “Disposition or change in use if ecological gifts – what recipients need to know”. www.ec.gc.ca/pde.egg.

3.2 Report to Environment and Climate Change Canada

Regardless of the severity of the violation, when the property was donated as an EcoGift, the land trust must report a change in use to Environment and Climate Change Canada and demonstrate what actions it is taking.

3.3 Consequences of CEA Violations

For EcoGifts, an unauthorized change in use may be subject to a special tax of 50% of the land value at the time of donation. This can be levied on the holder of the Easement! Beware of this possibility and take extra care in maintaining relationships with landowners of EcoGift properties and following a regular and complete monitoring routine.