

LST.01 Conservation Easement Enforcement Policy

1. INTRODUCTION

The Escarpment Biosphere Conservancy (EBC), a registered charitable organization, receives and holds donated conservation easements on privately-owned lands to ensure the perpetual protection of the land's conservation values. By receiving and holding donated conservation easements, EBC has an obligation to preserve this corporate and charitable asset. EBC provides a charitable receipt for the appraised value of the conservation easement, meaning that there are also obligations to Canada Revenue Agency (CRA) and Ontario's Ministry of Natural Resources and Forestry (MNRF).

Regardless of the severity of a violation, as a charitable asset the EBC must protect the conservation easement and take care not to improperly release/dispose or impair of any portions of the asset. The durability of a conservation easement is dependent on the easement holder's ability to enforce the Conservation Easement Agreement (CEA) terms, which is an agreement between EBC and the landowner (whether original donor or subsequent landowners). Effective enforcement builds public confidence in easements as a land protection tool and in the EBC's ability to protect land in perpetuity. Moreover, there is an additional layer of obligation for conservation easements that qualify for ecologically sensitive land tax credit status under the Ecological Gifts Program of Environment and Climate Change Canada that land trusts accepting easements uphold the terms of these easements and maintain sufficient financial capacity to enforce their restrictions.

Occasionally, the terms of a CEA are violated by the landowner or a third party due to a desire to make an "improvement", forgetting as time goes on, disregard of the CEA terms, unfamiliarity with the restrictions, etc. When an easement is violated, EBC's objective is to restore compliance with the terms of the CEA and ensure the perpetual protection of the property's conservation values with the greatest degree of cooperation from the landowner and taking into account cost effectiveness proportional to the scale of the violation.

The following guidelines and procedures will help assure that appropriate steps are taken to document and address the violation, so that the conservation easement's conservation values are preserved and protected.

2. GUIDELINES FOR RESPONDING TO SUSPECTED EASEMENT VIOLATIONS

1. Respond quickly to all suspected violations.
2. Address all potential violations, no matter how minor, but maintain perspective and keep EBC's response proportional to the severity and circumstances of the violation.
3. Comply with all applicable laws.
4. Maintain the conservation purpose(s) of the conservation easement and protect the land's conservation values in perpetuity, in keeping with the documented intent of the original grantor.
5. Maintain public confidence in EBC's ability to enforce easement restrictions generally.
6. Take no action that would result in private inurement or impermissible private benefit.
7. Protect EBC's legal rights and financial investment (if any) in the conservation easement.
8. Maintain a constructive and cooperative working relationship with the landowner to the extent possible.

9. Never give a landowner an on-the-spot opinion as to whether a violation has occurred. Do not tell a landowner what the land trust's response will be until the matter has been reviewed by the EBC Board of Directors.
10. While legal counsel may be retained to provide advice early in the process, litigation should be used as a last resort and only when counsel advises that the land trust is likely to prevail in court
11. Act promptly to resolve the issues. The dispute may cause the landowner stress and concern. The longer the matter remains unresolved, the more difficult it may be to find a resolution.

3. IDENTIFYING A VIOLATION

A suspected easement violation may be discovered during an annual monitoring inspection or reported by neighbors, new property owners, aerial imagery or other third parties. In the event of a suspected violation, EBC will respond as follows:

- A. **Review the easement and documentation of conditions on the property.** After the land trust receives notice of a suspected violation (after annual monitoring or by third party), a staff or Board member will be appointed "CEA Compliance Coordinator", who reports to the Chief Executive Officer (CEO). The date that the violation was first notice will be documented. The CEA Compliance Coordinator will review the entire easement deed, amendments (if any), baseline documentation report, and past monitoring reports to determine whether it is likely that an easement violation has occurred, and what specific easement terms may have been violated. If a legal interpretation of easement terms is needed, the land trust's attorney is consulted.
- B. **Inspect and document the suspected violation.** The CEA Compliance Coordinator visits the property to inspect and document the suspected violation. Details of the suspected violation are recorded, including location, extent of damage to conservation resources, and size of damaged area. When possible, damage should be documented in quantitative terms, e.g. number of trees cut down, length and width of unpermitted driveway, etc., and be referenced to specific sections of the baseline documentation report and/or reports of monitoring visits conducted before the violation occurred. Photos keyed to a photopoint map are taken, signed, and dated by the photographer, and, if possible, compared with photos taken before the violation occurred. Field notes are taken and signed and dated by the person conducting the inspection. If the suspected violation was observed during a site visit, it will be reported as part of the Annual CEA Monitoring Report.

If the landowner refuses to allow the land trust to enter the property to conduct the inspection, the CEA Compliance Coordinator will keep record of those communications and will consult the land trust's attorney for advice on how to proceed.

- C. **Determine whether and how severe a violation has occurred.** As soon as possible after discovery of the suspected violation, the CEO reviews the information gathered during the inspection against the terms of the easement and other documentation. The rationale for determining the severity of the violation will be documented.

Major violation: Any action requiring enforcement that will cost \$5,000 or more to remediate, including human resources and other direct costs incurred by the land trust, or any action that

significantly damages the conservation values protected by the easement and/or increases the undue benefit of the easement. Examples: pollution, large-scale dumping, construction of roads or structures, timber harvesting, destruction of habitat, exceeding the number of buildings allowed, grant easements, or allow any economic benefit that doesn't align with the intention of the easement nor with covenants, among others.

Minor violation: Any action requiring enforcement that will cost less than \$5,000 to remediate, including human resources and other direct costs incurred by the land trust, or any action that does NOT significantly damage the conservation values protected by the easement. Examples: minor dumping, minor tree cutting, dark sky violations, failure to comply with mowing requirements.

Technical violation: A violation of the terms of the easement that has no discernable impact on conservation values and requires no remediation. Examples: failure to comply with notice requirements when exercising a reserved or permitted right, signage violations, failure to notify land trust when property is sold. Technical violations can usually be resolved by explaining the terms of the easement to the landowner, securing the landowner's pledge to comply with them, and, when appropriate, granting discretionary approvals retroactively.

D. Considerations in evaluating suspected violations. The CEO should consider the following when determining how to identify and resolve the violation and respond to the landowner.

1. Is the violation a clear breach of a specific term of the conservation easement? Or is the easement language ambiguous or silent on the issue?
2. Who caused the violation? The original grantor? Successor landowner? Third party?
3. Was the violation intentional or accidental? Is it a reoccurrence of a previous violation or the latest in a series of violations by one landowner? Is there any evidence that the landowners were looking for changing, not complying or ignoring the easement for their economic benefit?
4. Were there any mitigating circumstances, such as the land trust's failure to respond to a landowner's questions or requests, ambiguous easement terms, landowner misunderstanding of permitted and prohibited activities? How should these circumstances affect the land trust's response, if at all?
5. What is the best way to resolve the violation? Demand letter? Litigation? Or alternatives such as negotiation and mediation? Document all actions taken including timeline.
6. Are there any parties such as co-holders or backup holders who should be notified of the violation and involved in its resolution? What will be their role?
7. Will the land trust's response to the violation set a precedent? How will its resolution affect the credibility of the land trust and its standing in the community?

E. Document this initial assessment. Write up all material collected from the initial concern to the final decision, including dates. If the conservation easement has not been violated, file the assessment as is. If the CEO determines that the easement has been violated, the CEO shall inform the Board of Directors via a CEA Violation Report, with a recommendation as to whether the violation is major, minor, or technical violation, an estimate of the effort and resources the land trust will need to expend to resolve it, and an outline of the corrective actions the land trust will require the landowner

to take. Corrective actions may consist of restoration, remediation and/or damages or compensation.

4. ADDRESSING A VIOLATION

It is important to take every violation seriously, regardless of severity, and respond to it. Failing to respond communicates that violations don't matter and this may lead to more breaches of the conservation easement.

- A. **Contact the landowner.** The CEA Compliance Coordinator contacts the landowner, and, if possible, meets with them in-person to discuss the violation. The Compliance Coordinator listens to the landowner's explanation, asks questions, takes notes, and asks the landowner to voluntarily correct the violation, or at least to cease any further activity until the matter can be reviewed again by the CEO. For minor and technical violations where the land can be restored to original condition, the landowner agrees to immediately take action to address the violation.
- B. **Provide written notice to the landowner.** The CEA Compliance Coordinator documents all meetings and sends a follow-up letter to the landowner formally notifying the landowner of the violation and confirming any agreements made with the landowner about the restoration of the property and the schedule for completion of the necessary work. The letter is sent via certified mail, return receipt requested, as well as regular mail, and a copy of it, along with CEA Compliance Coordinator's notes and the confirmation of receipt, is placed in both the land trust's permanent and working files.
- C. **Notification of Violations to MNRF and Ecological Gifts Program.** The CEA Violation Report (including the proposed restoration/management actions) will be submitted to the appropriate MNRF office for their review and consideration. In cases where the property was donated under the Ecological Gifts Program, the CEA Violation Report (including the proposed restoration/management actions) will be submitted to Ontario's Ecological Gifts Coordinator for their review and consideration.

5. RESOLVING A VIOLATION

- A. **If restoration is required and the landowner agrees.** If the landowner subsequently agrees to restore the property, CEA Compliance Coordinator immediately sends a follow-up letter that describes the nature and extent of the restoration work to be completed and the agreed-upon schedule for completion of the necessary work. The landowner is requested to sign the letter to indicate they agree to the plan. The property is inspected by the land trust on the date by which restoration work is to be completed, and the restoration work is documented with photographs, narrative description, and quantitative measurements. (The documentation, as well as all correspondence with the landowner, is stored in both the land trust's permanent and working files.) After the inspection, CEA Compliance Coordinator sends the landowner a follow-up letter (certified – return receipt requested and regular mail) stating whether the remediation work has been successfully completed, and thanking him or her if it has. If it has not been completed, a second follow-up letter is sent, firmly stating expectations for compliance and establishing a new deadline. If the subsequent inspection reveals that the work has still not been completed and there is reason to doubt that the landowner truly intends to comply, the land trust's attorney is asked to draft a letter restating the expectations

for compliance and mentioning the possibility of legal action. The CEO is advised of all developments regarding landowner compliance and provided with copies of all correspondence. In large and extended remediations, land trust checks in with the landowner and visits the land during the progress of the work.

B. If restoration is required and the landowner refuses to comply. If the landowner refuses to voluntarily restore the property, the CEA Compliance Coordinator consults the CEA to see what it states about addressing violations, and engages the land trust's attorney and the CEO to discuss the violation and develop an enforcement strategy. Potential strategies include:

- Sending a second certified letter demanding cessation of the violation and the immediate restoration of the affected conservation values.
- Seeking formal mediation of the issue with the landowner.
- Searching for a person sympathetic to the land trust who knows the landowner well to intervene with the landowner to prevent litigation.
- Sending landowner a letter proposing that the dispute be adjudicated by the courts of Ontario.
- Initiating litigation to obtain a court order against the landowner.
- If the landowner also violated the law, notifying the government agency responsible for enforcing it.

Judicial enforcement (i.e. litigation seeking a court order or injunction) is time-consuming, expensive, and unpredictable. Even when it appears that the land trust has an airtight case, a judge may rule in favor of the landowner, setting a precedent that may impede future enforcement actions. In any case, taking the landowner to court will likely cause irreparable damage to his or her relationship with the land trust. Judicial enforcement should be pursued as a last resort. Nevertheless, legal action may be necessary to defend an easement, prevent or stop damage to the conservation values, and obtain full restoration of the property.

Alternative Violation Remedies. Ideally, resolution of the violation will result in the restoration of the property to its pre-violation condition. But this is not always possible. In situations where full restoration is not achievable, the land trust may consider additional remedies, such as mitigation payments, amending the conservation easement to include more land or to enhance the restrictions on the existing land, etc. In proposing such remedies, the land trust must take care to avoid giving the impression that a landowner can buy his or her way out of an easement violation. Any remedy short of full restoration must be carefully scrutinized to make sure that it does not confer impermissible private benefit or private inurement on the landowner. The proposed remedy must be approved by the land trust's Board of Directors before it is offered to the landowner.

C. Where a violation has taken place, the landowner will pay the following: All remediation costs and related expenses including legal fees, surveys, appraisals, forestry evaluations, habitat assessments, etc. If consistent with the terms of the CEA, additional fines and/or restoration projects may be assigned to the landowner at the discretion of the Board of Directors.

6. THIRD PARTY VIOLATIONS

The land trust regards its relationship with owners of conserved land as a partnership in which both parties seek a common goal: effective stewardship of the conserved land. When third parties trespass on conserved land and damage the resources that the owner and the land trust have conserved, the land trust will work collaboratively with the owner to stop the trespass and have the trespasser remediate any damage caused by his or her actions.

The land trust considers third-party violations on a case-by-case basis when deciding what education measures and remedies are necessary. If the trespasser is unwilling to cooperate with the landowner and the land trust, the land trust may seek a court order (alone or in conjunction with the landowner) compelling the third-party violator to cease activity that violates the terms of the easement and remediate the damage.

7. MANAGING PUBLIC RELATIONS

An enforcement action may lead to inquiries from the media, neighbors, other landowners, government agencies, and others. When enforcing an easement, particularly if legal action is involved, the land trust designates a spokesperson for the organization and adheres to the following guidelines in managing public relations.

1. The land trust does not seek publicity in the event of a violation. The land trust may choose, however, to respond to inquiries, correct misstatements of fact reported in the media, and clarify its role and responsibilities as an easement holder.
2. In discussing the violation publicly, the land trust does not attribute motive or intention to the violator. Public statements should instead focus on the fact that the easement was violated and it is the land trust's job to see that the violation is remedied and the conservation values restored to the greatest extent possible.
3. The land trust respects the landowner's privacy, particularly when the violation may have resulted from a mistake or misunderstanding. Again, the focus is on the need to remedy the violation, not on the landowner.
4. If the land trust is pursuing legal action, it discusses with its attorney what information can and cannot be released before making any public statements about the violation or the enforcement action.

8. VIOLATION PREVENTION STRATEGIES

When holding a conservation easement, violation prevention is the best defense. EBC has adopted the following practices to encourage ongoing landowner compliance with easement restrictions:

1. Maintain constructive and collaborative relationships with CEA landowners and help them feel connected to the land trust through regular newsletters and invitations to events and outings, etc.

Build trust and open communication with the landowner to be sure the terms of the conservation easement are understood and to encourage collaboration and compliance.

2. Document communications with the landowner and site visits. Keep a record of every conversation with the landowner. Write up notes after each site visit and consider sharing them with the landowner.
3. Conduct monitoring inspections at least annually and record findings in a written monitoring report to proactively check for compliance. Invite landowners to accompany the monitor on the inspection visit. Use monitoring visits to inspect the property based on what was initially reported in the baseline documentation report, and provide evidence of current conditions with photographs and other information.
4. Track changes in ownership.
5. Promptly contact new owners (and work with real estate agents) to ensure they understand EBC's mission, the terms and restrictions of easement that apply to the property, and the concept and purpose of conservation easements in general. Send the Assumption Agreement to the person in charge of the property transaction for the new landowner's acknowledgment and signature (get new landowners' contact information and proceed to connect with them, arrange an introduction site visit/online meeting?)
6. Encourage landowners to ask EBC to review a proposed action whether or not it is contemplated under the terms of the easement in order to avoid a potential violation.
7. Periodically send landowners a written summary of the terms of their easements every 3-5 years