

Standard 11: Conservation Easement Stewardship

The land trust has a program of responsible stewardship for its easements.

A land trust that accepts and holds conservation easements commits itself to their annual stewardship in perpetuity, to enforcement of their terms, and to building positive landowner and community relationships to support the land trust's conservation programs and enforcement actions. A land trust that fails to do so may eventually lose its credibility, could cause its easement program to be invalidated, may erode public confidence in easements, and ultimately risk the protection of the land. Not all land trusts have the capacity to hold easements in perpetuity and may achieve their conservation goals through partnerships with other organizations, fee ownership or other conservation methods. These practices will help ensure that the conservation values protected by conservation easements are sustained over time.

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The land trust determines the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure these funds and has a policy committing the funds to this purpose. (See 6G.)

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The land trust monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps documentation

(such as reports, updated photographs and maps) of each monitoring activity.

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Practice 11D: Landowner Relationships

The land trust maintains regular contact with owners of easement properties. When possible, it provides landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures. The land trust establishes and implements systems to track changes in land ownership.

Building Strong Relationships with Landowners

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When, What and How to Tell New Owners

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The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense. (See 6G and 11A.)

Value of Enforcement

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Practice 11F: Reserved and Permitted Rights and Approvals

The land trust has an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.

Managing Permitted Use Notifications

Review and Approval of Reserved Rights

Tracking Approvals

Practice 11G: Contingency Plans/Backups

The land trust has a contingency plan for all of its easements in the event the land trust ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the land trust secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement, the land trust has complete and accurate files and stewardship and enforcement funds available for transfer. (See 11H.)

General Backups for Assets

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Practice 11H: Contingency Plans for Backup Holder

If a land trust regularly consents to being named as a backup or contingency holder, it has a policy or procedure for accepting easements from other land trusts and has a plan for how it will obtain the financial resources and organizational capacity for easements it may receive at a future date. (See 11G.)

Responsibilities of Backup Holders
Planning Ahead

Practice 11I: Amendments

The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

Conservation Easement Amendments
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Practice 11J: Condemnation

The land trust is aware of the potential for condemnation, understands its rights and obligations under condemnation and the IRC, and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The land trust works diligently to prevent a net loss of conservation values.

Condemnation for Public Purposes

Practice 11K: Extinguishment

In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

When Can an Easement Be Extinguished?

Introduction

Acquiring a conservation easement is often such an intensive and climactic experience that future care of the property may seem of secondary importance. Nonetheless, stewardship of its conservation easements must be a top priority of a land trust. Effective stewardship has many benefits for the land trust.

- **It defends the property's conservation resources.** Sound stewardship ensures the land trust meets its responsibility to protect conservation resources in perpetuity.
- **It fosters good public relations.** Members, past and future donors, and the general public all scrutinize how well a land trust cares for its conservation easements. Ultimately, healthy public support and healthy finances depend on a sound

stewardship program.

- **It minimizes the impact of inevitable stewardship problems.** A land trust that regularly monitors its easements and maintains a working relationship with the landowner will frequently spot and resolve potential easement violations before they become serious. Time, money and positive public relations are preserved along with the integrity of the land.

Inadequate stewardship risks the conservation values of the property and the land trust's reputation. To illustrate: A land trust is negligent in monitoring an easement that protects old growth habitat and associated threatened species. A timber-cutting violation, unchecked by the land trust, destroys irreplaceable habitat—and the trust's credibility. Even one mishandled stewardship issue can haunt a land trust for years into the future.

Inadequate stewardship risks the credibility of conservation easements generally. If land trusts are perceived as not adequately safeguarding the resources protected by easements they hold, public confidence in conservation easements may be eroded. Land trusts owe it to the public, to themselves and to each other to operate sound stewardship programs.

Effective stewardship includes thoughtful easement drafting, good landowner and community relations, regular and documented monitoring, a commitment to enforce the easement, contingency planning, and strong financial planning. These are discussed in the practices that follow. For further information, see *The Conservation Easement Stewardship Guide*, by Brenda Lind and published by the Land Trust Alliance.

Links to Other Resources from LTA

- [“Law Update: The Legal Case for Conservation Easement Stewardship”](#), *Exchange*, Summer 2002 (Vol. 21 No. 3)

Related LTA Publications

- [The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements](#), by Brenda Lind, 1991.

Other Helpful Resources

- [Avoiding Conservation Easement Violations Through Adoption of Good Stewardship Practices](#) – prepared by Jane Ellen Hamilton, 2003.
- [Conservation Easements Over Time: Amendments, Condemnation, Mortgages, Minerals & Merger](#) – prepared by Camilla Herlevich, Esq.
- [Examples of What Some Land Trusts Across the Country Are Doing, or Considering Doing, to Prepare Themselves for their Long-Term Easement Management Responsibilities](#)

Sample Materials from Land Trusts

- [Colorado Open Lands – Conservation Easement Program Manual](#)
- [Columbia Land Conservancy \(NY\) – Conservation Easement Stewardship Guidelines](#)
- [Lowcountry Open Land Trust \(SC\) – Easement Stewardship Growth as of February 2003](#)
- [Minnesota Land Trust – Conservation Easement Stewardship Program](#)
- [Open Space Institute \(NY\) – Conservation Easement Policy Statement](#)
- [The Nature Conservancy of Canada – Stewardship Manual](#)
- [Vermont Land Trust – Executive Limitations: Conservation Easement Stewardship](#)

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Practice 11A: Funding Easement Stewardship

- The land trust determines the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure these funds and has a policy committing the funds to this purpose. (See 6G.)
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This practice emphasizes the need to review immediate and long-term costs of easement holding, and to secure operating and/or dedicated funds to carry out the land trust's obligations. A land trust should perform a calculation for every transaction to determine the funding needed for stewardship and enforcement, or determine a standard fee to assess for every easement. The land trust should then collect these fees or raise the necessary funds for each easement, or ensure that it has a steady source of operating income to cover these costs. Land trusts should be able to fund their annual stewardship costs and have enough funding in place to at least initiate an enforcement action, if not pay for it completely. Specifically restricted funds should be placed in a designated fund or funds (see 6G.) If a land trust does not have adequate funds for stewardship and enforcement it should have a fundraising strategy and a board policy committing the funds for this purpose, and be able to demonstrate progress toward meeting the goals of the strategy.

Determining Whether to Accept the Easement

Before a land trust decides to accept an easement, it must consider the financial and management implications of stewardship. Monitoring an easement requires the commitment of time and money. Enforcement, should a violation arise, requires even greater resources. Before accepting a conservation easement a land trust should address questions like these:

- **Is there another easement holder that is preferable?** Holding easements is a liability for a land trust. If someone else can more effectively protect the land, the trust may not want to shoulder the stewardship responsibility.
- **Is the land trust capable of monitoring the easement?** Consider whether size, distance and remoteness of the property will make monitoring impractical for the land trust.
- **Can the trust negotiate restrictions that can be sufficiently monitored?** A land

trust, for example, would be unable to monitor restrictions prohibiting unleashed dogs. (See practice 11C.)

- **How likely are violations?** Consider the surrounding land use and local attitudes toward protecting the land. For example, a land trust might be unable to enforce a “forever wild” easement if the property was located in the middle of a development with multiple adjacent users.
- **Does the land trust have, or can it raise, adequate funds to monitor and enforce the easement?** Land trusts can and do refuse easements when monitoring and defending the easement would be unacceptably difficult or expensive, or when the stewardship funding is not secured for the easement.
 - One land trust refused an easement on land threatened with eminent domain proceedings, in order to avoid a politically and financially expensive court battle.
 - Another refused an easement on land located in a developed subdivision, judging that its conservation value had already been diminished and that its protection would require more monitoring than the trust could provide.
 - A number of land trusts frequently turn down easements when stewardship funds are not secured in advance of completing the project.

(Land trusts also need to review potential easements against their own criteria. See practice 8B).

Determining Potential Stewardship Costs

A land trust must plan to fund four major stewardship activities: baseline documentation; routine monitoring; maintaining ongoing landowner relationships; and enforcement to correct violations. Whether these stewardship activities will require lots of time and money or less depends on the complexity of easement provisions, land type, monitoring plan, availability of voluntary and donated resources, and likelihood of violations. Land trusts should consider the following when estimating their stewardship expenses:

Baseline documentation, monitoring and landowner relationship costs

- **Staff/consultant/volunteer time.** Who will compile baseline data, perform routine monitoring tasks, visit the property and new landowners as needed, maintain documentation, answer landowner questions, and respond to violations? How much time will it take and what will it cost?
- **Travel expenses.** How much and what type of travel is involved in monitoring (for example, car or boat travel, aerial monitoring)?
- **Maps and photos.** What maps and photos are needed for baseline documentation?

What additional photos will be needed for monitoring? What are the costs of aerial photos and archival quality materials?

- **Administration.** How much will phone, mailing, photocopying, archival storage, and overhead cost?
- **Special monitoring provisions.** How much will specialists cost if they are needed to review and monitor particular easement provisions, such as water quality protection restrictions?
- **Grantee approval provisions.** For easements with reserved building rights, how much will staff time cost for plan reviews, conferences with the landowner and site inspections? Are there other easement provisions that will require additional review time, such as woodland management plan approval?

Enforcement costs

- **Time.** How much time will be needed to meet initially with the landowner and/or violator, and to develop, review and inspect reparation?
 - **Professional costs.** What technical services, such as engineering, boundary surveying, water quality testing, or timber surveying, could be needed, and what will they cost? How much will it cost to hire counsel to review easement violations, advise the land trust of an appropriate response to violations, and defend the easement in court if necessary?
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How to Calculate Costs

How much money should a land trust set aside for stewardship costs per easement? Land trusts use a variety of models to predict and prepare for stewardship costs. This discussion focuses on the amount needed for each easement, regardless if the funds are raised by the land trust or voluntarily contributed by the landowner.

- **Monitoring costs.** At a minimum, most land trusts (at least those that do not rely solely on volunteers for this work) aim for a deposit to the fund that will generate adequate income for annual monitoring costs.
- **Landowner relations.** Many land trusts also budget in a figure for building and maintaining relationships with easement landowners, including, for example, answering their questions, distributing a newsletter and/or providing technical assistance on land management issues.
- **Baseline documentation costs.** Some land trusts also include baseline documentation expenses in their calculations. For example, the Vermont Land Trust, a statewide land trust, includes \$800 in its stewardship fund request to cover baseline documentation costs. Other land trusts charge the landowner separately for baseline

documentation, or take it out of their general operating budget because it is a one-time stewardship expense.

- **Enforcement costs.** Some land trusts also add enforcement expenses to their calculation. For example, the Brandywine Conservancy, a regional land trust in Pennsylvania, adds a set amount to each contribution calculation to build its fund for enforcement purposes. The exact amount depends on an assessment of the legal risks of the particular easement and when legal problems might arise. Some land trusts plan to fundraise for additional enforcement expenses when needed because these expenses can run into the thousands of dollars and are extremely difficult to predict or estimate. (In one recent case, a land trust spent more than \$250,000 enforcing an easement in court.) The principal in the monitoring fund at least helps ensure the trust will have some funds available up front to cover enforcement costs. Some land trusts plan to fund the full cost of enforcement out of other endowment funds. A land trust should build some reserve to be able to finance enforcement when necessary.

Here are some methods for calculating the stewardship contribution:

- **Case-by-case calculation of projected annual costs.** Some land trusts have developed standard calculations to help them estimate probable annual costs for each easement. Once the annual cost is estimated, the easement holder can determine the total investment required to generate an amount equal to the annual cost based on an estimated rate of return (typically 5 percent).

For example, the Seacoast Land Trust (NH) uses volunteer easement monitors with staff overseeing volunteers and the stewardship program. Here is a sample calculation from SLT to estimate the amount needed for the stewardship fund for a particular easement:

Annual monitoring and reporting:	
1 hour staff time @ \$30/hr + \$25 direct costs + \$10 travel	\$65
Landowner/abutter inquiries, annual average:	
2 hours staff time @ \$30/hr + \$10 travel	\$70
Enforcement, annual average:	
2 hours @ \$30/hr + \$10 direct costs	\$70
Total estimated annual cost:	\$205
Invested amount needed to generate \$205 annually at 5% rate of return:	\$4100

A sampling of easement holders that use a per-easement calculation method report the following typical estimates for the stewardship fund request:

- Seacoast Land Trust: \$3,000 to \$6,000
- Upper Valley Land Trust (NH): \$2,500 to \$11,000

- Maine Coast Heritage Trust: \$6,000 to \$10,000
- **Base rate modified for acreage and complexity.** Some easement holders determine a base rate that is applied to all prospective easements. That number is then modified based on specific factors for each easement such as:
 - Acreage
 - Easement complexity (allowed house lots, reserved rights, easement holder reviews and approvals required, etc.)
 - Public or private landowner
 - Public access requirements

For example, Bear-Paw Regional Greenways (NH) uses volunteer easement monitors with staff oversight. Requests for the stewardship fund are based on the following schedule:

<u>Acre</u>	<u>Base request</u>
< 25	\$1,250
26-99	\$1,750
100-200	\$2,250
200 or more	\$2,750

- Add \$1,000 per reserved house lot
- Add \$250 per reserved right
- Add \$250 if public access is guaranteed
- Add \$250 for publicly owned lands

Other groups that use this approach design the numbers according to their particular goals. For example, the Vermont Land Trust uses a base of between \$2,000 and \$6,000, depending on acreage. Then it adds \$800 for each first house, house lot or subdivision right allowed with another \$400 for each additional such right.

The Society for the Protection of New Hampshire Forests further modifies this approach: The Society holds more than 500 easements and uses staff for all stewardship activities. Easements are inspected aurally every year, and visited on the ground at three to five year intervals. By rough estimate, one staff person can monitor 60 to 100 easements annually. Including salary, benefits and a factor for administrative support, this costs more than \$50,000 annually (not including legal costs). The Society estimates that the average annual cost per easement is at least \$500. The stewardship fund amount needed to generate \$500 per year at a 5 percent rate of return is \$10,000. When acquiring easements, Society staff explain that the estimated per-easement cost of stewardship for an average new easement is \$10,000 or more. The Society requests a portion of this cost from the landowner, calculated using a \$2,000 base rate plus \$500 per reserved right. Landowners may contribute more toward the full cost. In addition, the Society seeks substantial additional funds from a variety of other sources.

- **Amount based on percentage of value.** Some land trusts base the suggested contribution on the value of the land. For example, in the past the San Juan Preservation Trust in Washington State requested 1 percent of the assessed valuation of the property prior to the transaction, or \$1,000, whichever is larger.

Stewardship is expensive. The contribution per easement seems to range from approximately \$2,500 to \$15,000 or more for very large or complex easements. As land trusts have gained more experience with easements, and have paid more attention to estimating their monitoring and enforcement costs, they have generally realized the amount of funding needed per easement is higher than they originally thought. Land trusts are continually re-estimating their costs and refining their formulas.

Raising and Maintaining Stewardship Funds

The surest way to meet stewardship costs is to set up a stewardship fund that is managed separately from the trust's operating budget. Income from the fund eventually supports most or all of the trust's stewardship expenses. This guarantees the land trust will be able to meet its stewardship responsibilities over time.

Even if a land trust is small and all volunteer, it should set up a stewardship fund, particularly to cover potential enforcement costs. All-volunteer land trusts rely on volunteer labor and the expertise of board members, thereby relieving much of the professional cost for routine stewardship. But when there is a serious violation, these trusts probably will have to hire professional services, and they will need liquid resources on which to draw for legal defense. Also, even if using volunteer labor today, it is important to plan ahead for a time when the land trust holds too many easements effectively to rely solely on volunteers.

Some organizations—generally those that rely on volunteers to do all monitoring—only have a “legal enforcement fund”. Some have two separate legal enforcement and monitoring or “stewardship” funds. The choice is largely a matter of financial policy and organizational philosophy, and may also reflect donor wishes. See practice 6G for more on establishing stewardship and enforcement fund policies.

To build this stewardship fund, a land trust needs to try to deposit an appropriate amount to the stewardship fund each time it acquires an easement. Land trusts often ask the easement donor for a voluntary contribution of the necessary amount to the stewardship fund. Where such a contribution is not possible, they may fundraise for the required amount, set aside their own funds from their operating budget, or make a transfer from some other established fund.

Land trusts that are newly established, working with landowners of little wealth, or purchasing conservation easements may find it difficult to set aside the full amount needed to fund ongoing stewardship costs. Nevertheless, the land trust should set aside some amount for every easement in a permanent fund. It also should aim over time to

build a fund that can fully support its stewardship activities. The longer the land trust waits, the larger the fund will need to be.

Alternative strategies

There are a handful of land trusts that have made the deliberate decision not to create a separate stewardship or enforcement fund. The Catskill Center for Conservation and Development (NY), with a large endowment of more than \$1 million, relies on general operating dollars to fund all of its stewardship actions. Similarly, the Civil War Preservation Trust, the nation's largest nonprofit organization devoted to the preservation of Civil War battlefields, funds both its routine stewardship activities and all enforcement expenses directly from its operating funds and membership income.

When and from Whom to Raise Funds

Most land trusts that request donations from landowners for stewardship costs ask that they accompany the easement grant. Another approach is to suggest donations be pledged over several years. Some land trusts accept non-cash donations, such as other land donated for resale or donation of services or articles of value for land trust auctions or fundraisers.

If the land trust plans to ask the easement donor for a contribution to the stewardship fund, it should bring the matter up early in the easement negotiations. The Maine Coast Heritage Trust recommends making the request in person and handing out a policy statement to help pave the way. This helps avoid surprising or offending the landowner, and gives the land trust a chance to explain its future costs.

If the landowner is unwilling or unable to make a gift to the stewardship fund, several other possibilities exist. Some land trusts regularly solicit monitoring funds from the community. The Peconic Land Trust, on Long Island, sets a target amount of cash contributions to be raised for an easement. If the donor doesn't make the contribution, PLT attempts to raise it from the community with the cooperation of the easement donor. Land trusts can look to neighbors, conservation-minded members of the community, or the municipality to make up the needed stewardship contribution. A few land trusts, such as some that purchase agricultural easements, set aside stewardship monies from their own funds.

Many land trusts are reluctant to accept donated conservation easements that are not accompanied by a contribution for stewardship. The Vermont Land Trust reports that it receives a contribution about 90 percent of the time. The Brandywine Conservancy observes, "most landowners willingly provide a contribution once they understand the importance of the land trust being financially prepared to uphold the terms of their easement." Each land trust needs to assess its own situation, but should not underestimate the willingness of easement donors to help the land trust maintain its promise to protect the easement in perpetuity.

Transfer fees

Some land trusts use transfer fees to fund the future cost of easement stewardship. Colorado Open Lands uses the following clause in some of its easement documents:

Transfer of Property. Any time the Property or a portion thereof is transferred by Grantor to any third party, Grantor shall pay a transfer fee of ¼ of 1 percent of the purchase price to the Grantee to be used for the purpose of the defense of conservation easements or for other purposes consistent with Grantee's mission. Grantor shall notify Grantee in writing within five (5) business days after closing using the form in Exhibit D attached hereto. The document of conveyance shall expressly refer to this Deed of Conservation Easement and shall include a copy of the new ownership deed. Said transfer fee shall be waived if the Property is transferred to Grantor's heirs or beneficiaries.

Links to Other LTA Resources

- [“Growing Pains and Stewardship Funds: The Northwest Experience”](#), *Exchange*, Fall 1997 (Vol. 16 No. 4)
- [“Tallying Up the Costs of Easements”](#), *Exchange*, Spring 2003 (Vol. 22 No. 3)
- [“Transfer Fees – Financial Boon or Legal Bust?”](#), *Exchange*, Spring 2003 (Vol. 22 No. 3)
- [“Vermont Land Trust Reevaluates the Costs of Easement Stewardship and How to Cover Them”](#), *Exchange*, Fall 2002 (Vol. 21 No. 4)

Related LTA Publications

- [The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements](#), by Brenda Lind, 1991.

Links to Other Helpful Resources

- [Conservation Easement Stewardship Costs and Funding](#), by Brenda Lind. NH Center for Land Conservation Assistance, November 2004.
- [Recent Research on Easement Stewardship Costs](#) – Dominic P. Parker, 2002.

Sample Materials from Land Trusts

- [Ausbon Sargent Land Preservation Trust \(NH\) – Why Does the ASLPT Monitor Properties?](#)
- [Bedminster Land Conservancy \(PA\) – Explanation of Costs: Stewardship Fund](#)
- [Brandywine Conservancy \(PA\)](#)
 - [Easement Endowment Calculation Form](#)
 - [Easement Preparation Cost Estimates](#)
 - [Policy Regarding Donations to Endowment for Conservation Easements](#)

- [Colorado Open Lands – Worksheet Calculating the Costs of Stewardship and Defense of a Conservation Easement and the Endowment Needed to Support It](#)
- [Columbia Land Conservancy \(NY\) – Estimated Annual Conservation Easement Administration Costs per Subdivision Right](#)
- [Conservation Trust for North Carolina – Conservation Easement Stewardship & Monitoring Fund and Legal Defense Fund for Conservation Properties](#)
- [Grand Traverse Regional Land Conservancy \(MI\) – Conservation Easement Endowment Calculator](#)
- [Jackson Hole Land Trust \(WY\)
Stewardship Costs
Stewardship Fund: Questions and Answers](#)
- [Jo Daviess Conservation Foundation \(IL\) – Policy: Easement Stewardship Fund](#)
- [Lowcountry Open Land Trust \(SC\) – Stewardship Contributions as of February 2003](#)
- [Minnesota Land Trust
Conservation Easement Project Cost Analysis 2002
Project Funding](#)
- [Vermont Land Trust
General CE Donation Worksheet 2004
Policy on Stewardship Endowment Contributions
Statewide Farm Cost Sheet 2004
Stewardship Budget and Endowment Analysis](#)

To Fully Implement This Practice, LTA Recommends...

- ❑ That the land trust have a secure and lasting dedicated or operating fund with adequate income for stewardship and administration, and monies to fully fund an enforcement action.
- ❑ That the dedicated funds have written policies governing the distribution of interest and withdrawal from the fund.
- ❑ That a calculation is performed for every transaction to determine the funding needed for annual costs plus enforcement, or a standard fee is assessed.
- ❑ That funds are secured at or prior to completion of the transaction, OR the land trust has a plan to secure these funds and a policy committing the funds to this purpose.

Practice 11B: Baseline Documentation

Report

- For every easement, the land trust has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgement of interim data [that for donations and bargain sales meets Treasury Regulations §1.170A-14(g)(5)(i)] are signed by the landowner at closing.
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Baseline documentation reports are critical for establishing the condition of the property at the time the easement is transferred, and are the basis of future monitoring and enforcement. In addition, for certain easements for which a federal tax deduction is granted, some baseline documentation at the time of closing is required. While it is sometimes difficult for land trusts to prioritize or gather all the data required, baseline reports should be completed prior to closing, and signed by the landowner and the land trust at closing. In the event of poor seasonal conditions for documenting the conservation values of the property, an interim baseline report with a finalization schedule can be signed by both parties at closing. The interim report can include all of the data available by the date of closing and should specify when the final report will be completed. The baseline documentation and any interim data should meet the requirements of [Treas. Reg. §1.170A-14\(g\)\(5\)\(i\)](#). The use of interim reports with the land trust and landowner's signature and date certain for finalization has proven effective in regions of the country where ground conditions prevent the completion of the full baseline documentation report at closing. In the past, land trusts may have accepted easements without a baseline documentation report. In these cases, the land trust should have a plan for completing documentation for all easements.

For more information, see Chapter 7 of the *Conservation Easement Handbook*, to be re-released spring 2005.

Baseline Documentation

Baseline documentation records the condition of the property at the time of acquisition. Baseline documentation identifies existing physical conditions, natural and man-made, at the time of acquisition. It provides a baseline for measuring future changes in the property's conservation resources and other features. Baseline documentation is required by the IRS for tax-deductible donations of conservation easements. But it is a must for

all land conservation acquisitions, not just easement donations.

As part of its recordkeeping policies, the land trust should have standard procedures for preparing, storing and handling baseline documentation.

At a minimum, baseline documentation must include photographs of key features and an aerial photo or detailed current map of the property, showing property boundaries, waterways, resource areas, roads, and structures. Recent site-specific resource inventories should be included, if available. If an appraisal was done as part of the transaction, information from that report, such as photos and summaries of man-made and natural features, should be included as well. The following information is usually included in the documentation:

- Date baseline documentation was prepared;
- Authorship and qualifications;
- Acknowledgment statement;
- Background information;
- Property description;
- Easement summary;
- Legal information;
- Conservation values;
- Maps or plans; and
- Photographs.

When to Document

Every easement should have baseline documentation prepared prior to closing that is signed by the landowner and the land trust at closing. In fact, IRS regulations require an easement donor to provide the land trust, prior to the date of the gift, documentation of the property's condition *as of* the time of the gift (see Treas. Reg. Section 1.170A-14[g][5][i]). In the event of poor seasonal conditions for documenting conservation values (such as snow cover), an interim baseline with a completion schedule should be signed at closing. If, on the other hand, the baseline has been completed and a significant amount of time elapses before the easement is transferred, it should be reviewed and possibly updated prior to closing.

The preparation of the baseline and the easement often happen simultaneously. At the initial site investigation, the land trust begins to identify the conservation values that will be protected by the easement and surveyed for the baseline documentation.

Preparing Baseline Documentation

The land trust must have a thorough record of initial property conditions and the grantor must certify its accuracy. This baseline information provides a point of comparison for

resolving future land use and easement violation issues. If a trust must go to court, baseline documentation is essential to show that the alleged violation did not predate the easement. According to IRS regulations, it is the landowner's responsibility to compile baseline documentation before donation of the qualified easement. In reality this task often falls to the land trust accepting the donation.

A land trust should gear its documentation to cover conditions of all special elements protected by an easement, including habitat, views and the like. Any areas that may be affected by landowner reserved rights, such as building areas, must be carefully documented in their "before" condition (as required by IRS regulations). *The Conservation Easement Handbook* and *The Conservation Easement Stewardship Guide* contain detailed information on who prepares the baseline documentation and how.

Storing Baseline Documentation

Given the critical significance of the baseline documentation, land trusts should have standard policies and procedures for its storage. At least three originals of the baseline documentation should be prepared at the outset: one for the landowner; one for the land trust's monitoring file; and one to be kept in a secure, fireproof location. In the event of a discrepancy among original baseline reports, the one held by the land trust in a secure location would be the guiding document. A "working copy" should also be made to take out into the field. When an easement property changes hands, a copy should be prepared for the new owner unless the previous owner provides the original. Also, if the easement designates a specific backup holder, or is co-held by another organization or agency, an additional original should be prepared for the secondary holder.

Increasingly, land trusts are using computerized storage of baseline documentation and other easement documents. This way, the baseline, easement document, maps, photos, monitoring reports, and other data are all linked. A digital system for storing stewardship records improves organization of records and allows quicker access to information. With such a system, for example, the land trust can click on a photo-point on an aerial photograph, and a page is displayed with the baseline photograph and all monitoring photographs taken from that point on the ground. Computer records, however, need to be updated as technology changes so data is not "lost" in formats that can no longer be retrieved by current technology. Digital records should always be backed up by an original hard copy of the baseline documentation and kept in a safe place.

Creating Baseline Documentation for Existing Easements

Completing baselines prior to closing is the best practice, but in the rush to accept easements, some land trusts have not always completed baselines concurrently with easement acquisitions. If baseline preparation is not addressed, land trusts can experience significant backlogs. A backlog typically occurs because the land trust did not have adequate resources to undertake the documentation work or underestimated the

importance of accurate baseline information.

Because it would be extremely difficult to document a property in its past condition, any easement baseline prepared, regardless of when the easement was granted, needs to document the property in its current condition. Also, it is questionable whether a baseline that tried to document past conditions could be used as evidence in court. When preparing baselines for existing easements, a land trust should be sure to use the same standard protocol as its other baselines, which will result in consistent and comprehensive reports. Like any baseline, a report prepared years later should document only the conservation values protected by the easement.

Links to Other LTA Resources

- [“Baseline Documentation and Easement Monitoring – Keys to a Successful Future Defense”](#), *Exchange*, Summer 1998 (Vol. 17 No. 3)
- [“Digitally Documenting Baseline and Stewardship Data”](#), *Exchange*, Fall 2000 (Vol. 19 No. 4)
- [Preparing Baseline Documentation Tailored to Your Conservation Easement – Rally 2004 workshop](#).

Related LTA Publications and Software

- [The Conservation Easement Handbook](#), by Elizabeth Byers and Karin Marchetti Ponte – to be re-released spring 2005.
- [The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements](#), by Brenda Lind, 1991.
- [Erler’s LandSteward Software](#) – a browser-interfaced database program that allows land conservation organizations better to manage the complex information needed to ensure effective stewardship and permanent protection of conserved land.

Links to IRS Resources

- [Treasury Regulations Section 1.170A-14\(g\)\(5\)\(i\) – Documentation](#).

Other Helpful Resources

- [Baseline Data Storage Information](#)

Sample Materials from Land Trusts

- [Anonymous](#)
[Baseline Data Photograph Documentation Sheet](#)
[Directions: Description and Background Information](#)

Directions: Property Condition Certification
Easement Documentation Report: Description and Background Information
Easement Documentation Report Summary Sheet

- Black Canyon Regional Land Trust (CO)
Baseline Documentation for Conservation Easement
Checklist: Baseline Study, Conservation Easements
- Columbia Land Conservancy (NY)
[Baseline Documentation Policy](#)
Preparing a Conservation Easement Baseline Documentation Packet
- Connemara Conservancy Foundation (TX)
[Baseline Documentation Report](#)
[Landowner Assistance Fee Schedule](#)
- [Five Valleys Land Trust \(MT\) – Baseline Inventory Procedures](#)
- Great Land Trust (fictitious) – Conservation Easement Document Certification
- [Oconee River Land Trust \(GA\) – Baseline Document](#)
- [Rockingham Land Trust \(NH\) – Conservation Easement Baseline Documentation File](#)
- Society for the Protection of New Hampshire Forests
[Baseline Documentation Field Form](#)
[Conservation Easement Baseline Documentation Report](#)
- Sudbury Valley Trustees (MA)
[Acknowledgement of Baseline Documentation](#)
[Baseline Inspection Checklist](#)
- Teton Regional Land Trust (ID) – Procedures Document
- The Nature Conservancy
Easement Documentation Report Checklist
Easement Documentation Report: Property Condition Certification
- [Upper Valley Land Trust \(NH\) – BDR Template](#)
- Vermont Land Trust
[Baseline Documentation Report](#)
BDR Check List: VHCB Projects

To Fully Implement This Practice, LTA Recommends...

- ❑ That the land trust have a written procedure or policy for creating baseline documentation.
- ❑ That every easement has a baseline report.
- ❑ That the baseline report documents the important conservation values protected by the easement AND the relevant conditions of the property as necessary to monitor and enforce the easement.

- That baseline reports, signed by the landowner and land trust representative, are completed prior to closing for new projects.*

* In the event of poor seasonal conditions for documenting conservation values, an interim baseline report with a finalization schedule is signed at closing.

Practice 11C: Easement Monitoring

- The land trust monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity.
-

There are several reasons why a land trust should monitor its easements annually. Monitoring helps a land trust develop a relationship with the landowner, helps discover changes in land ownership, enables it to see if the easement is effective, helps uncover violations, saves time and money on enforcement actions, and establishes a record in case of court action. Annual monitoring routinely reminds the landowner of the easement and provides a means for annual landowner contact. With annual monitoring the land trust can promptly document any changes in the property's condition relative to the easement. While some land trusts regularly conduct "drive-by" or informal monitoring activities, the monitoring results should be documented to build a record for future monitoring and in case the land trust must address a violation. Some easements with particularly sensitive conditions, or on land where a landowner is performing management activities, may require monitoring more frequently than once a year. Land trusts use a combination of on-the-ground review, aerial observation and other methods in their annual monitoring.

See Chapter 9 of *The Conservation Easement Handbook* (to be re-released spring 2005) for more on easement monitoring.

Establishing a Monitoring Program

A land trust should establish monitoring policies and procedures that provide guidance for staff and volunteers. The policies should cover the purpose, frequency and method of monitoring; documentation and recordkeeping; who should monitor; pitfalls to avoid; and how monitors should be trained. Procedures should clearly describe each step of the monitoring process to ensure that all properties are inspected in a similar manner regardless of who conducts the monitoring visits.

Each land trust typically develops its own easement monitoring report form or checklist that corresponds to the type of easements it holds. It is also helpful for a land trust to tailor a monitoring form to the terms of the particular easement; this ensures that the monitor checks for conditions of the property specific to the goals of the easement.

Doing the Monitoring

Experienced land trusts recommend monitoring at least annually. This routinely reminds the landowner of the easement, helps the land trust learn of any changes in ownership, becomes the basis for landowner communications, and allows the land trust to stay abreast of changes in the property's condition. Making monitoring an annual event ensures the land trust will regularly check the property's condition.

Annual monitoring a minimum

Easement lands with a greater potential for violation may need more frequent inspection. Some examples include:

- **Unusually restrictive easements.** For example, an easement that prohibits tilling on farmland that abuts a watercourse should be checked often enough to discover any violation and limit damage that could occur.
- **Easements with allowed development.** Especially during construction, these easements need frequent inspection.
- **Easements in heavily used areas.** For example, easements neighboring residential developments have a greater potential to be abused and violated by trespassers.
- **Small easements or those with many abutters.** Such easements may need more frequent inspections to check for trash and trespass violations.
- **Easements with public access provisions.** Depending on the type of access allowed and any maintenance responsibility the trust has accepted, these easements may require frequent inspection to check for hazardous conditions, vandalism or abusive uses.

Some easement holders do a formal monitoring visit twice a year or more. More commonly, land trusts make it a habit to conduct frequent, informal monitoring drive-bys of more vulnerable easement properties.

Monitoring methods

Land trusts monitor by aerial observation or by walking the property, depending on the size and restrictions of the property.

AERIAL MONITORING

Aerial monitoring can be the most cost-effective way to cover a big easement area or numerous small easements in a concentrated area. The U.S. Fish and Wildlife Service monitors its waterfowl management easements by air. The Society for the Protection of New Hampshire Forests, which holds more than 80,000 acres of easements statewide,

monitors its easements using several days of flight time per year. Low-altitude flight is the best way to see large, remote properties and to view the boundaries and interior thoroughly. However, aerial monitoring requires facility with maps and aerial photos and great familiarity with the landscape. It helps to have the same person do the monitoring each year to capitalize on the monitor's experience. Whenever a violation is suspected or aerial observation shows significant change in the property, the property must be monitored by foot as well.

GROUND MONITORING

Ground monitoring is appropriate for easements small enough to be covered on foot. It is essential for restrictions that require close visual inspection—for example, restrictions on overgrazing measured by the condition and composition of forage. Likewise, an easement with specific use restrictions to prevent disturbance to an endangered species could require close visual inspection.

MONITORING BY BOAT

A third method, monitoring by boat, is sometimes used for shoreline protection easements. However, if the easement extends inland past the sight distance, additional ground or aerial monitoring is needed.

Who monitors?

Staff, volunteers or board members can monitor easements. Land trusts with adequate staff recommend having a trained person—one who is familiar with the property and restrictions and experienced in spotting and resolving problems—do the monitoring visit. Some land trusts have tried using interns, but point out that the lack of continuity from year to year can be a problem. Volunteers can be excellent monitors, especially if they live near the property and can do frequent checks, but volunteers need thorough training to perform monitoring tasks and keep adequate records. Many smaller land trusts have board members do monitoring. This keeps monitoring in-house and keeps board members well informed about property condition. Land trusts may also contract their monitoring to an experienced individual.

Whoever does the monitoring, a trust must be sure that person keeps excellent records and is fully accountable for their accuracy. These records must stand up to potential legal challenge.

Steps in monitoring

The monitor should follow these basic steps for the annual monitoring visit:

1. **Contact the landowner**, to invite him or her to accompany the monitor.
2. **Compile and review materials.** Shortly before monitoring, the monitor should review the baseline documentation and past monitoring reports, making note of any problems to check or additional information to gather. For the visit, the monitor should gather and become familiar with property information, including:

- Aerial photo with property boundaries outlined;
- U.S. Geological Survey topographic map with property boundaries outlined;
- Survey or other map of property bounds and features;
- Easement summary sheet or abstract, for a quick reference on restrictions; and
- A copy of the deed, if a landowner visit is planned.

It is also useful to bring:

- Camera and film;
- Easement inspection forms;
- Field measuring tape and compass; and
- Flagging tape for marking boundaries or problem areas.

3. Conduct the monitoring. The actual monitoring may be performed in two ways:

- **Aerial monitoring**—The monitor should schedule the flight for a time of maximum visibility. In much of the country, the air is most clear in early spring, after the snow melts, but before trees leaf out. When flying, the monitor should use the maps to locate the boundaries. Then he or she should carefully examine the property for changes, keeping in mind the specific deed restrictions and referring to the aerial photo for comparison. Finally, the monitor should take photos of any suspected violations or major changes in property condition, taking notes and listing photos taken.
- **Ground monitoring**—The monitor should review the easement terms with the landowner and walk the property, visiting in particular any areas of special concern. The monitor should check the boundaries of the property; this is where trespass from adjacent landowners most frequently occurs and goes unnoticed. He or she should also check any areas of the land affected by landowner reserved rights or special easement restrictions. Finally, the monitor should photograph any significant changes caused by natural processes (fire, flood, etc.) and any possible violations of the easement. As always, the monitor should take field notes and list photos taken.

Completing Documentation

The results of monitoring must be documented and saved to build a record for future monitoring and in case the land trust has to go to court over a violation. The monitor should:

1. Fill out an easement inspection form. At a minimum, inspection forms should include:

- Name of inspector, affiliation, address, and signature;
- Date;

- Property owner and location;
- Presence or absence of owner; and
- Comment area for condition of property; notes on condition of specially restricted areas.

Most land trust inspection forms include space for more detailed observations.

- 2. Label and file photos taken in the field.** When photographing, the monitor should use established, mapped photo points and record new photo points as necessary on the map. The monitor should label each photo with the property name, date and photo point or other location description. The photographer and/or a staff member who can attest to its accuracy should sign the photo. Some land trusts also have the landowner sign photos. Many land trusts recommend using a date-back camera and archival quality black-and-white film and storage sleeves for all photos. Again, these steps all become important when an easement violation requires legal action.
- 3. Notify the landowner in writing that the land trust inspected the property and that it appears to be in compliance.** Many land trusts recommend sending the landowner two copies, and asking that one copy be signed by the landowner and returned. They follow up with a phone call if necessary and retain the signed copy in the file.

If monitoring is done by air, the land trust should set a schedule to meet with the landowner. Aerial monitoring cannot replace periodic personal contact with a landowner to review the easement terms and answer questions. Such meetings may be less frequent than monitoring flights, but should be done every few years and every time property ownership changes, even within the family.

Storing records

Land trusts should follow their records policy when storing monitoring reports. Keep monitoring documentation in a safe place known by land trust board members and staff. It is a good idea to keep two complete sets of monitoring documentation, one in the working file and the other in the permanent file. See practice 9G for more detail on recordkeeping.

Links to Other LTA Resources

- [“Baseline Documentation and Easement Monitoring – Keys to a Successful Future Defense”, *Exchange*, Summer 1998 \(Vol. 17 No. 3\)](#)
- [“A Guide to Conservation Easement Monitoring”, *Exchange*, Fall 1997 \(Vol. 16 No. 4\)](#)
- [Monitoring Conservation Easements: Staffing, Budgeting, Planning & Timing – Rally 2002 workshop.](#)
- [Monitoring Large Forest Conservation Easements – Rally 2003 workshop.](#)

- [New Approaches for High Quality Monitoring & Monitor Training – Rally 2003 workshop.](#)
- [Using Volunteers to Monitor Conservation Easements: Can it Work for You? – Rally 2002 workshop.](#)

Related LTA Publications

- [The Conservation Easement Handbook](#), by Elizabeth Byers and Karin Marchetti Ponte – to be re-released in spring 2005
- [The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements](#), by Brenda Lind, 1991.

Sample Materials from Land Trusts

- [Bedminster Land Conservancy \(PA\) – Annual Monitoring Report](#)
- [Brandywine Conservancy \(PA\) – Initial Monitoring Letter](#)
- [Columbia Land Conservancy \(NY\)](#)
 - [Annual Monitoring Report 2004](#)
 - [Follow-Up Monitoring Letter 2003](#)
 - [Initial Aerial/Ground Letter – 2002](#)
 - [Interim Ground Letter – 2003](#)
 - [Monitoring Policy](#)
- [Connemara Conservancy Foundation \(TX\)](#)
 - [Conservation Easement Monitoring Report](#)
 - [Conservation Easement Monitoring Report: Photography Affidavit](#)
- [Grand Traverse Regional Land Conservancy \(MI\) – Follow Up Landowner Monitoring Letter](#)
- [Harding Land Trust \(NJ\) – Conservation Easement Monitoring Report](#)
- [Legacy Land Trust \(TX\) – Conservation Easement Annual Site Review](#)
- [Little Traverse Conservancy \(MI\) – Initial Landowner Monitoring Contact Letter](#)
- [Maine Coast Heritage Trust – Example of Letter Acknowledging Required Notice](#)
- [Marin Agricultural Land Trust \(CA\) – Post-Monitoring Letter](#)
- [Montana Land Reliance – Monitoring Policy](#)
- [New Jersey Conservation Foundation – Conservation Easement Monitoring Policy](#)
- [Society for the Protection of New Hampshire Forests](#)
 - [CE File Outline for Monitoring](#)
 - [Conservation Easement Aerial Monitoring Abstract](#)
 - [Conservation Easement Stewardship Visit Checklist](#)
 - [Grantee Easement Monitoring Report](#)
- [Sudbury Valley Trustees \(MA\)](#)
 - [Conservation Restriction Baseline Inspection Report](#)

[Conservation Restriction Photography Affidavit](#)
[Digital Photographic Images; Chain of Custody Record](#)
[Memorandum of Understanding Between SVT and Local Land Trust for Monitoring](#)
[Monitoring Checklist](#)

- [Tall Timbers Research Station \(Red Hills Conservation Program\) \(FL\) – Monitoring Procedure](#)
 - Taos Land Trust (NM) – Initial Landowner Monitoring Contact Letter
 - Teton Regional Land Trust (ID)
[Easement Stewardship Visit Report](#)
[Procedure List for Annual Monitoring](#)
 - Vermont Land Trust
[2000 Monitoring Report](#)
[Annual Visit Standards and Practices](#)
 - [Westchester Land Trust \(NY\) – Monitoring](#)
-

To Fully Implement This Practice, LTA Recommends...

- That the land trust has and follows a written monitoring policy, which requires at least annual monitoring.
- That annual monitoring is conducted for every easement OR there is an alternate and appropriate monitoring schedule for the easement.
- That monitoring activities are documented in writing.

Practice 11D: Landowner Relationships

- The land trust maintains regular contact with owners of easement properties. When possible, it provides landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the land trust's stewardship policies and procedures. The land trust establishes and implements systems to track changes in land ownership.

Landowner contact has always been a part of *Land Trust Standards and Practices*, but land trusts are increasingly realizing that developing strong relationships with landowners is the best way to help provide for good stewardship of the land and avoid potential conservation easement conflicts. This practice is expanded to address the need to build relationships with existing and new owners of easement land and the managers of such land. Landowner relationships should ideally extend beyond once-a-year contact during a monitoring visit, and may include newsletters and updates, special workshops or other events. Land trusts may refer landowners to individuals who can help with the property's natural resource management. Every land trust should have a person (staff or volunteer) assigned to respond to landowner requests or inquiries about their easements.

Building Strong Relationships with Landowners

Building strong relationships with the owners of easement-protected properties may be the best way to reduce both the threat of potential easement violations and resource degradation. As the pace of conservation activity increases, and a second and third generation of owners takes over easement-encumbered properties, the need for strategies to build effective relations with landowners increases to ensure the protection and enhancement of a property's conservation values. Enhanced landowner relationships can take place through the conservation easement, in association with the easement or completely outside of a conservation easement.

Land trusts are engaged in a number of activities to build relationships with landowners. These range from sharing basic information to jointly managing resources. A few examples are provided below.

- **Landowner outreach.** This can include informational or educational activities geared to landowners to help them manage their lands to sustain conservation values. Outreach may happen through websites, field trips, tours, publications, and other forms of communication and media.

- **Landowner recognition.** Some land trusts have programs specifically to engage landowners in improving or enhancing their stewardship of the land and its natural resources. These may include specific publications just for easement landowners, awards for stewardship or other programs.
- **Landowner services and technical assistance.** Land trusts may have programs, services and personnel dedicated to assisting landowners in obtaining resources, regulatory approval and services that enable them to improve or initiate land stewardship activities. Activities might include: assisting with applications for funding or providing connections to the appropriate agencies; preparing resource management plans; providing contacts to contractors; performing, designing, or overseeing management or restoration activities; and providing connections to other landowners for management and/or leasing of lands.
- **Active management.** Land trusts may work with landowners to plan and implement land management activities. This might include projects for wetlands enhancement, fencing riparian areas for grazing management, or reseeded or reforesting lands with native species.
- **Research.** Land trusts and landowners may work together to sponsor or conduct research in land management techniques or innovations, usually in cooperation with other educational or scientific organizations, with the objective of evaluating the practical application of these techniques on privately managed properties.

Land trusts must evaluate which of these activities they have the capacity to engage in successfully, and how working with landowners on these types of projects can both ensure the continued effectiveness of the conservation easement and the protection of the property's natural resources.

Landowner Contact and Easement Monitoring

A land trust must thoroughly explain easement restrictions and the trust's role in monitoring those restrictions to every landowner. This time and effort up front will gain the cooperation of the landowner and discourage potential violations.

The land trust should explain its monitoring policy. To the landowner, the monitoring policy imparts confidence that the easement will be defended over time. Most landowners want to understand monitoring procedure, particularly on-the-ground inspections that may involve them. A landowner who feels included in the monitoring process from the beginning is less likely to feel policed by the land trust.

Informing Landowners of Monitoring Policy

Building strong relationships with landowners is essential. The land trust and the landowner are partners in the effective management of the easement. To start, a land trust must discuss the trust's role as easement holder with the landowner who granted the easement, as well as with future owners. For easement grantors, the discussion might occur during final easement negotiations or at a meeting shortly thereafter. This gives the landowner an opportunity to ask questions and participate in the monitoring planning. For future landowners, the discussion should occur as soon as possible after the land trust learns of the new ownership. (Working with new owners is discussed further below.)

Essential information to convey

In such a meeting the land trust should:

- **Explain why the trust monitors easements, and its right to inspect the property** and enter it at reasonable times for monitoring purposes.
- **Explain the monitoring procedure.** The land trust should describe how and how often it plans to monitor. It should show the landowner monitoring forms, photo procedures, and the like, and explain how documentation will be compiled and maintained. The land trust should discuss when the landowner should expect to hear from the trust (a letter before site visits and after site visits, for example) and encourage the landowner to accompany monitoring site inspections.

Additional useful information

It also may be useful to:

- **Discuss any particular conditions on the property the trust must inspect.** For example, if a restriction prohibits all tree cutting within 100 feet of a pond, the trust should explain that the monitor will inspect the woodland.
- **Review baseline documentation,** including photos, notes and studies or summaries that the land trust has prepared. The trust should highlight its documentation of existing conditions that the landowner may alter. For example, if a landowner has reserved the right to expand a shed, the trust should explain how baseline documentation photographs of the shed will provide the basis for comparison in future monitoring.
- **Review the land trust's policy for handling easement violations** and legal rights to enforce the easement.
- **Invite the landowner to contact the trust** with any questions about interpretation of the easement.
- **Leave written information on the trust's monitoring policy.**

Some land trusts also send periodic newsletters to owners of easement-restricted properties to build a continuing understanding of the land trust's work. These newsletters

may also update the landowner on monitoring policy changes.

Identifying New Owners of Restricted Land

Land trusts report that most easement violations occur after the property leaves the original grantor's hands. The new landowner, who was not involved in easement negotiations, most likely will have little understanding of the restrictions.

A land trust should inform the new landowner about the easement restrictions and monitoring policy as soon as possible. This helps prevent violations resulting from the new owner's ignorance, misinterpretation of the easement, or underestimation of the land trust's willingness to enforce its terms.

How landowners find out about the easement

Even if the previous landowner or realtor does not tell a prospective buyer about an easement, the new landowner's title search should flag it. The deed the new owner gets should note the existing conservation easement in a statement such as "...conveyed subject to a perpetual conservation easement granted to XYZ Land Trust recorded at Book and Page..."

To help ensure that a title search exposes the easement, a land trust can periodically record an inspection report or affidavit signed by the land trust and landowner that acknowledges the easement. The Maine Coast Heritage Trust (MCHT), for example, periodically records an easement inspection form for all its easements in the county registry.

Caroline Norden formerly of MCHT explains, "This becomes important 41 years after an easement has been granted, when an attorney conducting a title search need only cover a 40-year period." It also records the land trust's monitoring activity in the public record, helping to establish the land trust as a responsible easement holder.

The document recorded should include the current landowner's and land trust's names to ensure that it will be properly indexed in the registry. This way a title search on the current landowner's deed will expose the easement. Land trusts should check state bar association standards regarding title searches for more information.

While a title search should flag an easement, the land trust cannot rely on the title search to make the landowner aware of the easement. Not all new landowners do a title search (e.g., landowners of inherited property). Even given a title search, the search can miss the easement, or the title opinion can fail to highlight its importance. When an easement is discovered, the landowner may not understand its restrictions, or respect its intent. A land trust must contact new landowners to introduce the trust and discuss the easement.

How land trusts learn of new owners

Land trusts need to establish ways to learn when easement-restricted properties change

hands. A combination of two or more of the following is probably best:

- **Notice of transfer.** Many land trusts require the landowner to notify the land trust of property transfer as a term of the easement. The Brandywine Conservancy also requires the landowner to request a letter of compliance from the Conservancy before transfer of the property. The Conservancy then inspects the property within 10 days of transfer to ensure that no violations exist. The inspection is designed to ensure that the seller will not be drawn into a lawsuit if the new owner violates the easement, and protects the buyer from liability for breaches by the seller.

However, land trusts using notification requirements report that in practice 50 percent or fewer landowners give the required notice. Although this constitutes a breach of easement, it is a difficult provision to enforce and it is usually a moot point once the trust discovers the breach by finding there is a new landowner. Maintaining an ongoing, working relationship with the landowner increases the chance the trust will be notified.

- **Returned correspondence.** Although learning of new owners by returned mail is not the ideal way, it does emphasize the necessity of staying in regular written contact with the landowner by sending annual monitoring reports or other correspondence.
- **Informal checks.** Frequent informal checks on the property, such as drive-by monitoring visits, may be the most reliable way to find out about property transfers.
- **Realtors.** Some land trusts routinely inform local realtors about easement properties. The realtor can then accurately inform prospective buyers, as well as tell the land trust about properties up for sale.
- **Deed registries.** Some land trusts check the local deed registries periodically for transfer of easement properties.

When, What and How to Tell New Owners

A land trust should contact the new landowner as soon as possible and arrange a face-to-face meeting. This gives the landowner the opportunity to discuss the easement restrictions and ask questions, underscores the land trust's commitment to enforce the restrictions, and establishes a working rapport with the landowner. In this meeting a land trust should:

- **Introduce the organization and its goals.** Explain how the easement and its restrictions fit in with the trust's mission, any other easements in the area, etc.
- **Review the easement's terms,** especially its restrictions, and the land trust's role in overseeing the restrictions. Explain how these restrictions came about and what resources the deed was designed to protect. If appropriate, discuss management concerns for the property.

- **Discuss other aspects of monitoring policy outlined previously.** Refer back to the beginning of practice 11D for additional discussion items.
-

Links to Other LTA Resources

- [“Easement Stewardship: Building Relationships for the Long Run”](#), *Exchange*, Spring 2002 (Vol. 21 No. 2)
- [“Partners in Stewardship”](#), *Exchange*, Winter 2004 (Vol. 23 No. 1)
- [Partners in Stewardship: Land Trusts & Landowners Working Together](#) – Rally 2003 workshop.

Other Helpful Resources

- [Maintaining Landowner Loyalty: Ideas & Suggestions](#) – Preston Bristow, Vermont Land Trust.
- [Tips for Locating Successor Generation Landowners](#) – prepared by Jane Ellen Hamilton, 2003.
- [Working with Easement Landowners Over Time](#) – Judy Anderson, 2000.

Sample Materials from Land Trusts and Other Organizations

- [Bay Area Open Space Council \(CA\) – Model Second Generation Procedures & Forms](#)
- [Brandywine Conservancy \(PA\) – Introduction Letter: 1st Time BC Easement Donor](#)
- [Minnesota Land Trust – Conservation Easement Stewardship Program \(p. 7\)](#)
- [New Jersey Conservation Foundation – Conservation Easement Newsletter](#)
- [Society for the Protection of New Hampshire Forests – Sample introductory letter to a new owner of easement protected land](#)
- [Teton Regional Land Trust \(ID\) – Successor Landowner Policy](#)
- [Tri-Valley Conservancy \(CA\) – Stewardship Principles](#)
- [Vermont Land Trust](#)
 - [Conservation Stewardship Program Philosophy, Outcomes & Principles](#)
 - [Stewards of the Land](#) – a publication for owners of land conserved with VLT
 - [Successor Landowner Outreach](#)

To Fully Implement This Practice, LTA Recommends...

- That the land trust has a standard process for building relationships with owners

of easement-restricted land and successor landowners.

- ❑ That there are trained staff or volunteers designated to respond to landowner inquiries or requests.
- ❑ That there is a system for annually checking and tracking changes in landownership.
- ❑ That the land trust meets with new landowners promptly.

Practice 11E: Enforcement of Easements

- The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense. (See 6G and 11A.)
-

When a land trust accepts an easement, it also accepts the responsibility to enforce that easement in the event it is violated, and to defend it from challenges. Land trusts facing their first enforcement action often wish they had a formal policy or written procedure to follow governing contact with landowners, board and staff roles, attorney involvement, and steps to take in the event a potential violation is discovered. This practice calls for all easement-holding land trusts to develop such a policy or procedure. In addition, land trusts must be prepared for enforcement actions and should have access to appropriate legal counsel and the financial resources to pursue the enforcement. Every land trust should promptly address every easement violation.

Value of Enforcement

A land trust must enforce the terms of its easements. In addition to protecting the conservation value of the land, enforcement is needed to:

- **Engender public confidence in the easement program.** Says Bill Sellers, formerly of the Brandywine Conservancy, “We must not forget that we are not only defending one easement, we are defending all the easements we hold and every easement donated to every land trust.” Addressing violations proves to the owner and the public that the trust stands by its easements.
- **Maintain the trust’s legal authority to enforce.** Letting a violation slide could jeopardize a trust’s ability to enforce the easement. A court may interpret delayed enforcement as a waiver of the trust’s rights to enforce a particular provision. Further, a court may limit a land trust’s right to enforce other terms if it has allowed previous breaches of the easement.
- **Maintain the trust’s ability to accept tax-deductible easement gifts and its tax-exempt status.** A land trust’s failure to enforce its easements could disqualify the land trust from accepting tax-deductible easements and jeopardize the deductibility of easement gifts made to it. U.S. Treasury Department regulations specify that to be eligible to receive tax-deductible easement donations, an organization must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” (See [Treas. Reg. 1.170A-14\(c\)\(1\)](#).) A land

trust's 501(c)(3) status also could be in jeopardy if it were shown that the trust relinquished enforcement rights to benefit private individuals.

Costs of Enforcement

Enforcement expenses may include extensive staff time, costs of special documentation materials, legal fees, and reparation costs. All easement deeds should be drafted to include the grantee's right to recover all costs, including legal costs, from the landowner in case of a violation by the landowner. As a practical matter, it is sometimes impossible to recover costs; land trusts must plan to draw on existing enforcement funds or raise funds as needed to meet such expenses.

Land trusts should be able to fund their annual stewardship costs and have enough funding in place to at least initiate an enforcement action, if not pay for it completely

Procedures for Enforcement

A land trust may discover a violation on a monitoring visit, through a neighboring landowner or other interested party, or during informal observation. It may have been caused by original owners, new owners, abutters, or trespassers. The trust's first response must be twofold: document the violation; and contact the landowner to discuss the situation. The land trust should be sure to consult its attorney with regard to any enforcement action.

Land trusts find it useful to write a policy detailing how they will respond to a violation. Who has authority to contact and discuss the violation with the landowner? How will a violation be documented? In what circumstances and at what point will legal counsel be consulted? Who will have authority to negotiate a resolution with the landowner? What other resources might be called upon for assistance? Of course, the demands of each violation will be different, but the trust can decide its basic approaches before a violation puts pressure on the trust to act quickly. (The land trust's enforcement powers should be included in the easement document.)

Document the violation

A thorough record of the violation will be essential should a land trust need to go to court. The violation should be carefully documented quantitatively and descriptively for an audience that does not know the property at all. Some useful techniques include:

- **Photos**, signed by the photographer and keyed to photo points on a map, or a video tape with verbal commentary.
- **Measurements of damage to the affected resource.** For example, if trees are cut in a restricted area, count the stumps and measure diameters, and take pictures of a ruler on the stumps. If an illegal road is bulldozed, map its position and record what was

destroyed.

- **Extensive signed and dated field notes.**
- **Explicit comparison with the baseline data.**

First, trust staff or volunteers should be thoroughly briefed by an attorney on proper procedures, conduct, correspondence, and other communication to protect the trust's legal interests.

Meet with the landowner

If the violation was discovered without the landowner present, the land trust should contact the landowner and arrange a meeting. A cooperative, face-to-face meeting to view the violation, review the easement restrictions, and discuss reparation is the most effective way to encourage the landowner to correct the violation.

If a third party—such as an adjacent landowner—caused the violation, the trust can arrange another meeting to bring together all parties and discuss correction. Even if the landowner did not cause the violation, he or she should be included in all negotiations, since legal responsibility for the violation ultimately falls on the landowner.

The parties should agree on a course of action to correct the violation and set an appropriate deadline for compliance. The trust should take thorough notes to document the meeting and then write a letter to all parties to confirm the required restoration action and compliance deadline.

Choosing the Appropriate Enforcement Response

When a land trust discovers a violation, it has a range of possible responses—from negotiating a voluntary solution to going to court. Usually the best approach is to start by seeking a voluntary solution, with legal action a last resort.

Voluntary reparation by a landowner

A voluntary, negotiated resolution to a violation is the most common, and highly preferred, solution. Most easement violations are caused unintentionally by landowners, abutters or other parties who were unaware of or did not understand (or did not take seriously) the easement. Violators are often willing voluntarily to make reparations negotiated with the land trust. A land trust should pursue this route until it is clear that it will be unavailing.

A land trust must keep careful documentation when working with the violator toward reparation. While face-to-face meetings are the best way to negotiate with the violator, a written record is essential. The negotiator for the land trust must carefully document the sequence and details of events as they happen. This may be done, for example, by writing a letter of memorandum to the violator summarizing each meeting, decision and

agreement. The trust should take extensive notes and photographs during property inspections of restoration work or subsequent violations. The record should be adequate to demonstrate the chain of events to a court, should litigation later become necessary. The trust should consult with an attorney to be sure it is following proper legal procedures.

A trust may want to involve legal counsel in greater depth at this point, depending on the type of violation and the attitude of the violator. Violations that damage an irreplaceable conservation value—for example, clear-cutting a special forest habitat—will demand more reparation than simply repairing the conservation value. Legal counsel may be especially useful to negotiate adequate reparation when complete restoration is impossible.

Discretionary approval or amendment

If the violation is very minor, or if it is unclear whether a violation has occurred, the land trust may consider a discretionary approval or a simple amendment that is consistent with its policies and does not compromise the property's conservation values (see practice 111 on amendments). Land trusts should carefully scrutinize whether this course of action would be appropriate. The value of the conservation easement should not be reduced by the amendment, nor should the amendment grant any increased value to the landowner. Any amendment should result in a net conservation gain, such as imposition of further restrictions in exchange for a waiver of the breached terms.

Mediation

If the violator and the land trust cannot reach an agreement for reparation but the violator is willing to cooperate with an outside party, mediation may offer an alternative to the courtroom. (This may not be an option unless it is specifically provided for in the easement document.)

In mediation, the parties hire a mediator to assist them in negotiating a mutually agreeable solution. This gives the land trust a role in the decision-making, but leaves it vulnerable to compromises that may encroach on the easement purposes. No legal precedent is established in mediated settlements.

A land trust should consider carefully the merits of the case when choosing between mediation and litigation. A land trust may not wish to entrust decisions involving large sums of money, easement language interpretation or legal principles to a mediator. For example, a land trust may want the courts to rule on an easement violation involving destruction of the habitat of an endangered species in order to establish a strong legal precedent for compensation for the destruction of irreplaceable conservation values. Further, in some cases state law may require the courts to be involved when easement violations are concerned.

Litigation: recourse of last resort

Experienced easement holders recommend that land trusts consider judicial proceedings a

last resort. Going to court is costly both in time and money, and it may irreversibly damage the landowner/land trust relationship.

Further, a land trust should go to court only if it is probable that the trust will win the case. A careful analysis by an experienced trial lawyer is essential. Because each judicial decision has the potential to set precedents for future resolution of easement issues—for every easement, nationwide—a land trust should carefully consider the risks and ramifications of losing. Conversely, a favorable court resolution of a critical legal issue or compensation for damages may be of great help to easement programs.

Sometimes a land trust must go to court. If a violator persists in a restricted activity that damages a protected resource, a land trust must seek a temporary restraining order or a permanent injunction from the courts. Moreover, litigation may be the only course available to respond to a violator who refuses voluntarily to repair damages or cooperate with mediation or arbitration. The bottom line for a land trust must be to defend the easement.

If a violation requires court action, a land trust should:

- Hire and thoroughly prepare the best legal counsel it can find.
- Actively participate in the formulation of the case.
- Use the trust's careful documentation of the violation, baseline and monitoring documentation, and experience on the land to their fullest advantage.
- Be sure the trust has or can obtain adequate enforcement funds to cover the legal expenses that are bound to be incurred.

Notifying LTA of Violations

Land trusts should be sure to notify the Land Trust Alliance (LTA) of major easement violations. Because conservation easements have as yet little legal history, land trusts are just learning how to address violations. Land trusts need to share information and experience on this essential topic.

It is particularly important that all land trusts notify LTA about major violations that might require litigation and/or set a national precedent. Every case brought to litigation is important for the whole land trust movement. Few violation cases have been through the courts; early cases have the potential for setting precedents that could affect easements across the country. Land trusts also should notify any statewide or regional land trust or assistance program in their area.

Links to Other LTA Resources

- [“Conservation Easement Violations: Results from a Study of Land Trusts”](#), *Exchange*, Winter 2000 (Vol. 19 No. 1)
- [“Dealing with Conservation Easement Violations”](#), *Exchange*, Winter 1997 (Vol. 16 No. 1)
- [“Exploring Options for Collective Easement Defense”](#), *Exchange*, Fall 2002 (Vol. 21 No. 4)
- [“Law Update: Restatement of the Law: Courts Take a Strong Stance to Enforce Easements”](#), *Exchange*, Spring 2001 (Vol. 20 No. 2)
- [“The Legal Efficacy of New Technologies in the Enforcement and Defense of Conservation Easements”](#), *Exchange*, Summer 2004 (Vol. 23 No. 3)
- [Negotiating with Landowners to Avoid Violations](#) – Rally 2003 workshop.
- [Steps to Take in the Event of a Conservation Easement Violation](#) – Rally 2003 workshop.
- [Third Parties: Enforcement of Conservation Easements By Them & Against Them](#) – Rally 2004 workshop.
- [Violations: When to Litigate, Mediate, Compromise or Amend the Conservation Easement](#) – Rally 2002 workshop.

Links to IRS Resources

- [Treasury Regulations Section 1.170A-14\(c\)\(1\)](#) – Eligible donee.

Other Resources and Publications

- “An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date”, Melissa K. Thompson and Jessica E. Jay, *Denver University Law Review*, 2001.
- Conservation Easement Violation Case Studies – Karin Marchetti Ponte
- How to Identify the Real McCoy – prepared by Karin Marchetti Ponte
- “Options and Recommendations for Creating Collective Financial Resources and Strategies for Easement Defense”, Darla Guenzler, Bay Area Open Space Council, 2002.
- [“Partial Compilation of Conservation Easement Litigation”](#), by Robert H. Levin, 2004.
- Typical Second-Generation *de Minimis* Violations Can Usually be Solved Without Litigation – prepared by Karin Marchetti Ponte
- What to Do (and Not Do) if You Suspect a Violation – prepared by Jane Ellen Hamilton, 2003.

Sample Estoppel Certificates

- [Conservation Easement Estoppel Certificate for Commercial Lender](#)
- [Estoppel Certificate – General](#)

Sample Materials from Land Trusts

- Brandywine Conservancy (PA) – Conservation Easement Violation Policy
- Connemara Conservancy Foundation (TX)
[Conservation Easement Compliance Incidence Report](#)
[Violation Procedures](#)
- Dutchess Land Conservancy (NY) – Conservation Easement Violation Response Procedure
- [Leelanau Conservancy \(MI\) – Conservation Easement Violations Protocol](#)
- [Sudbury Valley Trustees \(MA\) – Conservation Restriction Violation Response Policy](#)
- [Tall Timbers Research Station \(Red Hills Conservation Program\) \(FL\) – Violation Procedure](#)
- [Teton Regional Land Trust \(ID\) – Easement Enforcement Guidelines](#)
- [Vermont Land Trust – Conservation Stewardship Program Violations Principles](#)
- Vermont Land Trust – Conservation Stewardship Program Third Party Enforcement Principles & Considerations
- [Westchester Land Trust \(NY\) – Enforcement of Restrictions](#)

To Fully Comply with This Practice, LTA Recommends...

- ❑ That the land trust have a written policy or procedure to guide its response to violations and enforcement, including the role of all parties involved.
- ❑ That any violations have been resolved, or are actively being resolved.

Practice 11F: Reserved and Permitted Rights and Approvals

- The land trust has an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.
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Many easements contain specific reserved rights or require that the land trust approve certain landowner actions. It is essential that land trusts track these rights and approvals in order to evaluate their capacity to steward the easements, respond to landowner information requests and prepare for any enforcement or defense actions. A land trust should have a paper file system or database for tracking this information. For every easement, the land trust should have complete information about the exercise of reserved rights or any granted or denied approvals. Land trusts should promptly respond to landowner requests for approvals to exercise reserved rights.

Managing Permitted Use Notifications

In addition to easement monitoring, land trusts often have oversight of certain activities on the land. Many easements permit resource management activities or future construction. Generally, these reserved rights or permitted uses require some sort of review or approval by the land trust before activities begin. Some permitted uses require advance written approval by the land trust, and others require notice but not approval.

The land trust should have policies and procedures for permitted use notices and approvals, and should discuss these with the landowner. The policies should detail what information the landowner must provide with the request, who reviews and approves the request, how that approval is documented, and other parties (co-holders or backup holders) that need copies of the request and approval documents. The land trust needs to maintain good documentation of these requests, particularly if approval is required, and must track the exercise of all reserved rights. If an easement has a limitation on the scope of a particular reserved right, the land trust must document when the rights have been partially exercised.

Review and Approval of Reserved Rights

If a land trust has accepted an easement with reserved rights that require its approval before the landowner exercises them, such as construction of buildings, then it must plan for the time and money required to meet this additional monitoring responsibility. Some

easement holders find that they spend more time reviewing and inspecting requests for approval than doing their regular monitoring, particularly for easements that allow limited development.

Because so many variables occur during construction, it is especially important to inspect the property frequently if buildings are approved. It is much easier to address and correct potential easement violations or misunderstanding during construction than later, when the protected resource may already be irreparably damaged. Wesley Ward of the Trustees of Reservations (MA) warns: "It may be extremely difficult to convince a court to order removal of a building already constructed."

Approvals should be followed up with inspections to make sure that what was approved is what actually occurs. It may be useful to meet with the individuals performing the work—for example, the construction manager or architect for buildings, the forester for sensitive logging jobs—to be sure they understand the easement restrictions. Again, leave a paper trail; document inspections, results and the land trust's final signoff when the work is complete.

Tracking Approvals

It is important that the land trust develop a system for documenting approval requests, the review process and the decision, so that a paper trail exists for future reference. Thorough documentation will help the land trust be consistent in future approval requests and avoid confusion about whether or not prior permissions have been granted.

One mechanism for tracking approvals and executed reserved rights is to have a master sheet in front of the project file that lists the reserved rights and the date of their execution. This approach is used by Colorado Open Lands. The Teton Regional Land Trust uses a more detailed form that is signed by both the landowner and the land trust when a reserved right has been exercised (see sample documents, below).

Some land trusts that hold many easements with various complex and diverse reserved rights and required approvals use a master database to track the execution of these rights electronically.

If a reserved right is executed that is a one-time right—such as the right to build a house or subdivide the property—the land trust should consider recording a notice or affidavit of the execution of that right in the office of the recorder of deeds, registrar or registry of deeds where the property is located. The act of recording provides "constructive notice" to the general public and puts any potential future owner of the property on notice that the specific reserved right in the easement document has already been exercised.

Helpful Resources

- [Discretionary Approval Letter as Alternative to Amendment – Karin Marchetti Ponte, 1999.](#)
- [Sample Conservation Easement Language Permitting Holder’s Discretionary Approval – Karin Marchetti Ponte, 1999.](#)

Sample Materials from Land Trusts

- [Anonymous – Form Reply for Either: 1. Required Approval 2. Acknowledging Required Notice](#)
 - [Colorado Open Lands – Exercise of Reserved Rights](#)
 - [Jo Daviess Conservation Foundation \(IL\) – Reserved Rights Policy](#)
 - [Maine Coast Heritage Trust – Example of Letter Acknowledging Required Notice](#)
 - [Teton Regional Land Trust \(ID\) – Reserved Rights Approval Form](#)
 - [Vermont Land Trust – Conservation Stewardship Program Request Approval Principles & Considerations](#)
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To Fully Comply with This Practice, LTA Recommends...

- ❑ That a formal system (paper file or database) is maintained for tracking reserved and permitted rights, the exercise of landowner rights, and approvals granted by the land trust.
- ❑ That complete information about the exercise of reserved rights is readily available for each easement.
- ❑ That the land trust respond promptly to landowner requests to exercise reserved rights.
- ❑ That the land trust have a written procedure for responding to landowner requests for approvals.
- ❑ The land trust records approvals that affect the land record.

Practice 11G: Contingency Plans/Backups

- The land trust has a contingency plan for all of its easements in the event the land trust ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the land trust secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement, the land trust has complete and accurate files and stewardship and enforcement funds available for transfer. (See 11H.)
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It is vital that every land trust consider what will happen to its assets if the organization ceases to exist, and plan accordingly. One strategy is to include backup or contingency provisions in the easement. This strategy may not be effective, however, without alerting the potential backup grantees or providing the necessary funding for backup grantees to take on the responsibility for the easements. In 11G and 11H, original grantees and future grantees are encouraged to follow established procedures and plan accordingly. In planning for a backup strategy, land trusts should have complete files for each easement and stewardship funds available to transfer to a new easement holder. Land trusts that regularly agree to be a backup holder may want to have criteria for what projects they will accept. Some land trusts that are named as backup holders follow the same acquisition and approval process for backup interests as they do when they are accepting any other easement.

General Backups for Assets

A land trust must make provision in its corporate charter (articles of incorporation, etc.) for distribution of all its assets in case the trust for any reason dissolves. This is required by the IRS in order to obtain 501(c)(3) tax-exempt status. State statutes may also contain pertinent requirements. This provides a minimal level of protection for the land trust's conservation easements, assuring that they will be transferred to another nonprofit, tax-exempt organization or government agency.

A dissolution clause does not, however, assure that the land trust's assets will be transferred to an entity that has a sincere commitment to their protection or expertise in easement monitoring or natural resources. A land trust can minimize this problem by specifying a type of organization, or a specific organization, to receive its assets.

But dissolution is not the only threat. The trust should also consider what happens if the trust continues to exist but simply disregards or is unable to fulfill its monitoring and enforcement responsibilities.

Backups for Easements

To provide the best assurance that its conservation easements will continue to be protected, a land trust needs to make some specific provisions to cover its easements in the event of its dissolution, and to anticipate, also, the possibility that the trust will not meet its responsibilities. Smaller or newer land trusts in particular can benefit from the umbrella of a backup organization. The backup offers added protection for the land, but also can offer expertise and credibility to the land trust. Older, more established land trusts often serve as backups themselves, but may also benefit from backup arrangements with other organizations.

IRS requirements

At a minimum, IRS regulations require that every tax-deductible easement includes a provision that allows the easement holder to transfer the easement to another entity only if the transferee is a “qualified conservation organization” that agrees to enforce the easement’s restrictions.

Additional backup approaches

Beyond this basic requirement, a land trust may choose to name specific backup organizations in its easements. A land trust should first secure the written agreement of any organization it chooses to name in such a backup capacity. Obviously, the backup only adds protection if it is willing to take on the responsibility. Potential backups include other land trusts in the area, certain national land conservation organizations and government agencies. In some areas or for some types of easements, however, a land trust simply may not be able to find a willing or appropriate backup.

Depending on the backup approach selected, the designated backup has more or less power to take certain responsibilities for the easement under specific triggering circumstances. Several options for backup relationships are listed here. The options available may be limited by state law, which should be investigated by the land trust's legal counsel.

- **Preferred transferee.** The easement names a preferred organization to which the easement will be assigned if the primary grantee relinquishes the easement or loses it in court action. The backup has no legal rights or responsibilities toward the easement until such time as a court makes the assignment. Even then, the preferred transferee can refuse the easement. This method offers less backup protection than the methods below, in which the backup accepts a role in the easement upfront.
- **Executory interest.** A backup organization may be given the power to terminate the primary easement holder’s position. It may cause the transfer of the easement interest to itself if the primary grantee land trust fails to enforce the easement adequately. Some termination provisions allow the backup to do this simply by registering a new deed; others require that a court must first approve the substitution after finding that the primary land trust has failed in its duties.

- **Third party right of enforcement.** The easement may give another organization the power to enforce the easement with the primary holder or alone if the primary grantee fails to enforce. However, the easement title remains with the primary easement holder.
- **Co-holder.** Two organizations are named as easement holders. Often one of the pair informally takes primary responsibility for the easement, and the other acts as a backup, providing resources when necessary. They have equal legal standing and responsibility to enforce the easement. Since co-holders are legally equal partners, conflicts can occur when they disagree about enforcement issues or expenses.

With the exception of the preferred transferee approach, any backup organization should sign the easement document along with the primary easement holder. Further, the primary easement holder must keep the backup informed about the status of the easement and should provide relevant documentation, such as evidence of its routine monitoring, so that the backup will be prepared to act if necessary. Correspondingly, a responsible backup organization checks with a land trust for which it holds a backup interest regularly to make sure the easement is being upheld.

Stewardship Resources for a Sound Transfer

The land trust should be prepared for transferring its easements by making sure that there are stewardship funds and complete project files available to transfer to the new holder. Without these precautions, it may be difficult to find a holder willing to accept the transfer of an easement. This entails planning ahead for a transfer, even if a transfer is not imminent.

- **Stewardship funds.** Practice 11A provides detail on how to calculate and secure stewardship funds. In the case of transferring an easement, the land trust should determine how it could transfer funds for stewardship to the new holding entity. The land trust should carefully review any restrictions placed on the original stewardship contributions.
 - **Complete up-to-date files.** The land trust should practice good recordkeeping according to practices 2D and 9G. A new holder will want to have background on the original easement transaction and, more importantly, up-to-date records of monitoring activities. These documents should be provided to the new holder.
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Links to Other LTA Resources

- [“The Maryland Experience: Private Local Land Trusts Co-Holding Conservation Easements with a Public Agency”](#), *Exchange*, Fall 1999 (Vol. 18 No. 4)

Examples from Land Trusts

- [Vermont Land Trust – Grant of Executory Interest](#)

Practice 11H: Contingency Plans for Backup Holder

- If a land trust regularly consents to being named as a backup or contingency holder, it has a policy or procedure for accepting easements from other land trusts and has a plan for how it will obtain the financial resources and organizational capacity for easements it may receive at a future date. (See 11G.)
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It is vital that every land trust consider what will happen to its assets if the organization ceases to exist, and plan accordingly. One strategy is to include backup or contingency provisions in the easement. This strategy may not be effective, however, without alerting the potential backup grantees or providing the necessary funding for backup grantees to take on the responsibility for the easements. In 11G and 11H, original grantees and future grantees are encouraged to follow established procedures and plan accordingly. In planning for a backup strategy, land trusts should have complete files for each easement and stewardship funds available to transfer to a new easement holder. Land trusts that regularly agree to be a backup holder may want to have criteria for what projects they will accept. Some land trusts that are named as backup holders follow the same acquisition and approval process for backup interests as they do when they are accepting any other easement.

Responsibilities of Backup Holders

Backup holders are taking on the responsibilities of the original easement holder. There are examples of land trusts that have assumed the primary responsibility for an easement when the original holder could not adequately safeguard the property's resources. These responsibilities include all the standard activities of the original grantee—annual monitoring, upholding the easement's terms, maintaining ongoing relationships with the landowner, and protecting the conservation values of the property.

If a land trust is regularly named as a backup holder, it should have policies or procedures to guide how and when it accepts these responsibilities. Here are a few examples of how land trusts have managed their backup responsibilities.

- **Have a policy regarding the holders it will work with.** The Society for the Protection of New Hampshire Forests will only accept a backup role in a conservation easement if the primary holder has adopted *Land Trust Standards and Practices*.

- **Require that the easement meet the new holder's criteria.** The new holder should ensure that the conservation easement meets its own acceptance criteria. Some land trusts have developed additional criteria the project must meet before being named as backup holder.
 - **Follow all acquisition procedures.** Both The Nature Conservancy and the Society for the Protection of New Hampshire Forests require that any easement they accept, regardless if it is an original interest or a backup interest, be approved using all the same transaction approval steps.
 - **Require funding and complete files.** Before accepting an easement from another entity, the land trust should require that any stewardship funds and up-to-date project files are also transferred at the same time. (See also practice 11G.)
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Planning Ahead

A land trust that is regularly named as a backup holder may need to take additional precautions to ensure that it will have the staff capacity and resources to manage the easements it may receive at a future date. Ensuring that any transferred easements come with the financial resources to support easement stewardship is an important first step.

The backup land trust should also keep track of the backup interests it has. When the land trust engages in strategic planning and determines long-term staffing needs, the likelihood of becoming the primary holder of these easements should be considered. Planning ahead will help ensure that the land trust has adequate resources to take on new responsibilities.

Examples from Land Trusts

- [Vermont Land Trust - Conservation Stewardship Program: Accepting Conservation Easements Philosophy](#)
- [Vermont Land Trust - Grant of Executory Interest](#)

Practice 11I: Amendments

- The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.
-

While easement amendments are not common, land trusts should expect to receive requests for amendments and may, in certain circumstances, wish to initiate an amendment to strengthen an easement or clarify language. Most land trusts, when faced with their first amendment request from a landowner, wish they had a policy to guide their actions. This practice encourages land trusts to develop an amendment policy to help ensure that amendments meet the mission of the organization and maintain the land trust's credibility. A policy should prohibit private inurement or excess private benefit, clarify board and staff roles, and ensure that all amendments result in either a positive, or not less than neutral conservation outcome. Many other standards are involved in reviewing amendment requests, including 1, 4, 6, 8, and 9, and practice 3F.

Conservation Easement Amendments

Conservation easements are written to last in perpetuity, but circumstances change over time. Land is transferred to new owners, land uses change, or new laws are written. As easements mature, it is likely that land trusts and property owners will seek amendments to modify the terms of the easement. Some amendments may have no practical effect on the property's conservation values; some may even be advantageous.

Reasons for amendments

Sometimes landowners or easement holders want to improve the easement with amendments to clarify vague language, correct oversights or errors in the original document, allow an unanticipated but acceptable use, or add new provisions to strengthen the easement. For example, after estate tax law changes were passed in 1997, a number of land trusts worked with their easement landowners to amend their easements, adding qualifying language to ensure that the easements would be consistent with the new requirements for receiving additional estate tax benefits.

Sometimes landowners will request amendments to pursue activities that would otherwise be prohibited by the easement, e.g., locating a driveway, well, septic field, etc. in the prohibited easement zone. Depending on the location of these activities, there may be no

impact on the protected conservation values. Of course, sometimes the potential impact will be ambiguous or negative, and the land trust must take great care in evaluating each circumstance individually.

In 1999, the Land Trust Alliance (LTA) conducted a national survey of conservation easement amendments and found that 4 percent of land trust-held easements had been amended. The original grantor requested more than half of the amendments, roughly one-quarter of the requests were made by subsequent landowners, and the balance were initiated by land trusts.

Amendment Policies and Procedures

An amendment policy helps the land trust be consistent and fair, and may even deter landowners from making inappropriate requests. Preston Bristow, formerly of the Vermont Land Trust, comments, “Landowners considering amendment requests often change their minds after reading our amendment policy because of our stringent standards for allowing amendments.”

In a 2004 study of land trust amendment practices, LTA found that 45 percent of responding land trusts use a written amendment policy. Of those, 63 percent of the policies were adopted by the land trust in the last four years. With near unanimity, 94 percent of those land trusts do not allow exceptions to their written policies. The only exceptions were to correct an error by the land trust, or to waive a fee.

An amendment policy should include both the land trust’s philosophy on easement amendments—including the circumstances under which an amendment will be considered—and the procedures used for responding to an amendment request. The underlying philosophy of most amendment policies is that any amendment should change the easement for the better, or the change should at least be neutral and necessary to correct an oversight in the original document.

For example, the Brandywine Conservancy (PA) allows neutral amendments (such as corrections to deed language) when the Conservancy initiates the amendment, but requires a “net conservation gain” when an amendment is made at the landowner’s request.

Amendment procedures that provide additional details beyond the policy could also address how the request is made (in writing, for instance), any required fees, who should be consulted, who should be notified, and who must review the amendment request.

Practical Considerations

Easement holders must approach amendments with great care. Land trusts should get experienced legal advice when considering amendments. State laws governing

conservation easements, charitable trust law, contract law, nonprofit corporation law and public trust law, and federal and state tax laws all might have something to say about if and how amendments are permitted. See chapter 12 of *The Conservation Easement Handbook* (to be re-released spring 2005) for a detailed discussion of the federal tax law implications of an easement amendment.

The cost of amending an easement depends on the type of amendment and complexity of the request. If the amendment request comes from the landowner, land trusts typically seek reimbursement. Land trusts responding to the 2004 LTA survey indicated that the average cost of an easement amendment was \$445. The highest single reported amendment request was \$10,000. In 63 percent of the amendments reported, the landowner covered the costs of the amendment. Land trusts covered the other costs from operating funds or designated funds.

Links to Other LTA Resources

- [“Amending Conservation Easements: Legal and Policy Implications”](#), *Exchange*, Spring 1999 (Vol. 18 No. 2)
- [Amending Conservation Easements: When, Why & How](#) – Rally 2004 workshop.
- [“Ask an Expert”](#), *Exchange*, Summer 1999 (Vol. 18 No. 3)
- [“Conservation Easement Amendments: Results from a Study of Land Trusts”](#), *Exchange*, Spring 2000 (Vol. 19 No. 2)
- [Designing a Conservation Easement Amendment Policy](#) – Rally 2002 workshop.
- [“Law Update: Tax Court Approves Deduction for Conservation Easement Amendment”](#), *Exchange*, Fall 2000 (Vol. 19 No. 4)

Related LTA Publications

- [The Conservation Easement Handbook](#), by Elizabeth Byers and Karin Marchetti Ponte – to be re-released in spring 2005.

Other Helpful Resources

- [Amendment of Conservation Easements](#) – Allen Beezley, Colorado Coalition of Land Trusts, 1999.
- [Questions to Answer When Considering Amendment](#) – Karin Marchetti Ponte, 1999.
- [Sample Conservation Easement Language Permitting Holder’s Discretionary Approval](#) – Karin Marchetti Ponte, 1999.
- [Who Must Approve Amendments](#) – Karin Marchetti Ponte, 1999.

Sample Documents

- [Agreement to Correct Deed of Conservation Easement – Karin Marchetti Ponte, 1999.](#)
- [Discretionary Consent Agreement – Karin Marchetti Ponte, 1999.](#)

Sample Policies and Related Materials from Land Trusts

- [Anonymous – Conservation Easement Amendment Policy](#)
- [Ausbon Sargent Land Preservation Trust \(NH\) – Policy on Amending Conservation Easements](#)
- [Colorado Open Lands – Conservation Easement Amendment Policy](#)
- [Finger Lakes Land Trust \(NY\) – Conservation Easements Amendment Policy](#)
- [Gallatin Valley Land Trust \(MT\) – Conservation Easement Amendment Policy](#)
- [Jo Daviess Conservation Foundation \(IL\) – Policy on Amending Conservation Easements](#)
- [Leelanau Conservancy \(MI\) – Conservation Easement Amendment Policy](#)
- [Maryland Environmental Trust – Amendment Procedures and Policies](#)
- [New Jersey Conservation Foundation – Easement Amendment Policy](#)
- [Tall Timbers Research Station \(Red Hills Conservation Program\) \(FL\) – Easement Amendment Policy](#)
- [Teton Regional Land Trust \(ID\) – Easement Amendment Approval Form](#)
- [Tri-Valley Conservancy \(CA\) – Policy Guidelines for Amending Conservation Easements](#)
- [Vermont Land Trust – Conservation Stewardship Program Amendment Principles](#)
- [Westchester Land Trust \(NY\) – Amending Conservation Easements](#)

Practice 11J: Condemnation

- The land trust is aware of the potential for condemnation, understands its rights and obligations under condemnation and the IRC, and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The land trust works diligently to prevent a net loss of conservation values.

Conservation easements may be subject to acts of condemnation. In these instances, a land trust should be prepared for the condemnation action, including having the percent of value data for the interests being condemned. A land trust should evaluate the impact of the condemnation action on the conservation values and, to the extent possible, work with the condemning authority to craft remedies that reduce these impacts or allow for additional conservation action.

Condemnation for Public Purposes

If property is needed for a public purpose, such as a school road or sewage treatment plant, it may be taken by a government agency, even against the wishes of the private owner (including a land trust). Some utilities also have the power to condemn property, such as for the installation of a gas pipeline. If the property is restricted by a conservation easement that prevents the proposed use, the restrictions may also be terminated by condemnation.

Condemnation is a complex issue, especially when it involves conservation easements. Conservation properties may be particularly attractive to government takings: they are ready open space and the land trust may be perceived as being easier to deal with than other (or multiple) property owners.

The land trust has a duty to defend its conservation properties and should not readily succumb to the threat of condemnation; the realization that the land trust will resist condemnation may be sufficient to cause the condemning authority to look elsewhere. On the other hand, the land trust may determine it is impossible or undesirable for it to defeat the condemnation, and may decide that negotiation will yield the best results.

Two actual cases illustrate both approaches. A preserve held by a Massachusetts land trust was threatened with condemnation by the local government for a sewage treatment facility. The organization successfully fought the proposal by contracting for studies that showed the preserve was not the best location for the facility and by waging a public relations and national letter-writing campaign against the condemnation of conservation land. In contrast, several conservation easements held by a land trust in Pennsylvania were threatened with condemnation by a gas pipeline. The land trust determined that it

would be unable to defeat the condemnation and focused its energies on negotiating an out-of-court settlement that best served the needs of the conservation resources, the landowners and the land trust.

A land trust faced with condemnation should consult with its legal counsel and carefully deliberate how to proceed. A decision to transfer any conservation property in response to the condemnation should be made following written transfer of assets policies: the land trust should require a two-thirds majority vote by the board to proceed and should ensure it is fairly compensated by the condemning authority.

The land trust, through its legal counsel, should also closely consider state law. Some states limit the ability to condemn properties in which an agency of the state has an interest, including a partial interest such as a conservation easement. It may be possible to negotiate a transfer or assignment of a conservation easement to a state agency to forestall condemnation.

Links to Other LTA Resources

[“When Eminent Domain Comes Knocking”](#), *Exchange*, Spring 2001 (Vol. 20 No. 2)
[Links to Other Helpful Publications](#)

[“When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land”](#), Robert H. Levin, *New York University Environmental Law Journal*, 2001.

Practice 11K: Extinguishment

- In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

In rare instances, an easement may be extinguished (for instance, when a conservation holder merges fee and conservation easement interests). In some states, certain forms of extinguishment must be court-ordered or court-approved. To the extent possible, a land trust should ensure that the conservation values will continue to be protected on the land following the extinguishment or ensure that additional conservation action is taken. Extinguishment of an easement should never be considered lightly, should only be an option of last resort, and should always consider the precedent that might be set and how extinguishment may impact the viability of the conservation easement tool itself.

When Can an Easement Be Extinguished?

Because most conservation easements are designed to be perpetual, the question of how and when an easement can be extinguished is usually far from the minds of the grantor and the land trust. However, there are rare and limited instances when a conservation easement might be extinguished. Land trusts can proactively plan for and help prevent many of these circumstances.

In addition to extinguishment due to condemnation as described in practice 11J, there are several other ways in which an easement might be extinguished. This discussion is excerpted from chapter 12 of *The Conservation Easement Handbook* (to be re-released spring 2005).

- **Foreclosure.** If there is a pre-existing lien on the property, foreclosure of such a lien may allow a new owner to receive title to the property free of any conservation easement placed on the land subsequent to the date of the lien. Following the practices of 9H will help a land trust prevent such an eventuality.
- **Marketable title acts.** Almost half of the states have marketable title acts that provide, after a certain term of years, that restrictions on real property are automatically extinguished. Several states have statutes that specifically exempt conservation easements. Land trusts should have a policy of rerecording the

conservation easement deed if required by their state statute to ensure that the easement's restrictions are not invalidated.

- **Changed conditions.** There is a long-standing legal doctrine that may prevent the enforcement of restrictions on land if the surrounding land use has changed so much that the restrictions no longer fulfill their original purpose. There is some question as to whether this doctrine applies to conservation easements, and the American Law Institute's 2000 *Restatement of the Law Third, Property (Servitudes)* states that changed conditions, such as surrounding development, are not consideration that permits modification or termination of servitude. Having broad or multiple conservation purposes can help a land trust prevent a claim of changed conditions.
- **Merger.** Under the law of most states, if the holder of a conservation easement becomes the owner of the restricted property, these rights merge, and the easement is automatically extinguished. If the easement is co-held, or the easement is transferred to another holder while the original holder accepts the fee interest, the merger will be defeated.

It is possible for a land trust to terminate an easement through its own action, but this is highly unlikely, and generally would not be desirable. If public benefits were lost by such a termination, it could result in an investigation or penalties by the state's attorney general. Moreover, it could cast doubt on the integrity of the organization and on the use of easements in general. As a matter of policy, a land trust should not consider voluntarily releasing a conservation easement, even for compensation, except under the most extraordinary circumstances. The right of the holder to extinguish an easement may be limited by state statute. In Massachusetts, for example, termination requires a public hearing. If the owner has taken a federal income tax deduction for the value of the donated easement, he or she may have to file an amended return to reverse the deduction.

Links to Other LTA Resources

- [“Law Update: Preventing Property Tax Foreclosure from Extinguishing Conservation Easements”](#), *Exchange*, Fall 2001 (Vol. 20 No. 4)
- [“Law Update: Protecting Conservation Easements from Marketable Record Title Act Extinguishment”](#), *Exchange*, Winter 2002 (Vol. 21 No. 1)
- [“Law Update: Restatement of the Law: Conservation Easements and the Doctrine of Changed Circumstances”](#), *Exchange*, Winter 2001 (Vol. 20 No. 1)

Related LTA Publications

- [The Conservation Easement Handbook](#), by Elizabeth Byers and Karin Marchetti Ponte – available spring 2005.

Other Helpful Publications

- [Restatement of the Law Third, Property \(Servitudes\)](#), American Law Institute, 2000.

° This material is designed to provide accurate, authoritative information in regard to the subject matter covered. It is provided with the understanding that the Land Trust Alliance is not engaged in rendering legal, accounting, or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought.