

Connecticut Land Trust Service Bureau

Practice Note #7: Managing and Enforcing Conservation Easements

- ◆ **Most open space protected by Connecticut land trusts to date has been through outright ownership (72%) as opposed to easements (24%).** Though the same is true for Massachusetts and Rhode Island, it contrasts with the preferred approach of trusts in Maine, New Hampshire, Vermont and New York, where the percentages are reversed.
- ◆ ***Yet this is changing.*** While the fee holdings of land trusts in Connecticut grew by 103% between 1990 and 2000, the percent of land protected through easements grew by 243% over the same period. Currently, about 68 Connecticut's 124 trusts hold easements over more than 20,000 acres statewide.
- ◆ ***Use of easements is growing in Connecticut – but are we prepared to manage and enforce them?*** Enforcement is important for reasons beyond just protecting the land's conservation value. Enforcement can “engender public confidence in the easement program, maintain the trust's legal authority to enforce, and maintain the trust's ability to accept tax-deductible easement gifts and its tax-exempt status.” (LTA S&P, 14-20)
- ◆ ***Studies reveal that problems are more likely to occur with the successor landowners of properties subject to easement.*** This suggests that, as the area of land protected through easements grows, Connecticut trusts may be facing a situation where enforcing easements could absorb considerable time, energy, and financial resources. The Connecticut Attorney General's stated position to defend donated easements has not yet been tried in court.
- ◆ ***Observance of a few basic practices can help your trust to avoid future problems.*** If you are holding easements, you should also observe the following:
 - *careful selection of easements for acquisition, with a defined process and criteria*
 - *careful drafting of easement components and clauses,*
 - *good baseline documentation and ongoing record-keeping,*
 - *set aside funds for easement monitoring and defense, obtained from easement donor or others,*
 - *regular monitoring and contact with landowners, especially when ownership changes,*
 - *define procedures for enforcing easement violations (see over).*
- ◆ Trusts that are members of the Land Trust Alliance can download excellent sample documents for all of the above through www.LTANet.org. See also Standard 14 in the LTA Standards and Practices Handbook. Connecticut Farmland Trust has information regarding agricultural conservation easements available on its website (www.ctfarmland.org).
- ◆ ***Easements are a potentially valuable tool for Connecticut land trusts.*** Especially where property values are high and when funds for acquisition are limited. A blanket avoidance of easements may cause a trust to lose out on many valuable conservation opportunities. Granted, managing easements can be more complex than fee-owned land, but if the trust observes the few basic practices noted above, the benefits to conserving and maintaining open space will probably outweigh the costs.

Easement Enforcement: Dealing with Violations

From Chapter 6 in Lind, B., The Conservation Easement Stewardship Guide, Washington, D.C., LTA, 1991 (See also Practice 14D – LTA Standards and Practices Handbook)

- ◆ **Develop a violation policy** – written guidelines for responding to easement violations – could include:
 - How the property owner will be contacted – who will have the authority to discuss the violation with the owner?
 - How will the violation be documented?
 - In what circumstances and at what point will legal counsel be consulted?
 - Who will have the authority to negotiate a resolution with the property owner?

- ◆ **Ensure the financial resources to enforce** – build an easement defense fund through donor and other contributions. Consider participating in a pooled easement defense arrangement.

- ◆ **Document the violation**
 - Take photographs, measure the affected resource, take extensive field notes
 - Compare and contrast the baseline documentation and relevant monitoring records
 - Notify LTSA of the violation

- ◆ **Meet with the property owner**
 - Try to negotiate voluntary repair or restoration of damage.
 - In the case of third-party violations, bring together all of the parties
 - If the act prohibited violates the law, notify law enforcement authorities as appropriate and consult legal counsel for advice on how to proceed

- ◆ **If the landowner agrees to voluntarily correct the violation**
 - Take thorough notes to document all meetings
 - Agree on a course of action to correct the violation
 - Set an appropriate deadline for compliance
 - Write a letter to all parties
 - When it is done, inspect and document the restoration work

- ◆ **If not, consider arbitration or mediation to resolve the violation**
 - If the violator is willing to cooperate with an outside party, consider arbitration or mediation.
 - In arbitration, the parties jointly hire, and pay for, an arbitrator who hears both sides and makes a decision.
 - In mediation, the parties hire a mediator to assist them in negotiating a mutually agreeable solution.

- ◆ **The Last Resort: Going to Court** – As a bottom line, the trust must defend its easement. Consider that the court case may be precedent setting, win or lose, and therefore the outcome may be important beyond the individual case.

This Practice Note is funded in part through a New England Leadership Grant from the Land Trust Alliance (LTA) Northeast Program underwritten by LTA's generous individual and foundation supporters.