

D. VIOLATIONS POLICY

Oakland Land Conservancy

BOARD POLICY 4.C. Conservation Easement Violations

Adopted by Oakland Land Conservancy Board of Trustees: January 8, 2006

Land Trust Alliance Standard 11.E. 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."

Purpose:

Easement enforcement protects the conservation values of the land under easement and maintains the Conservancy's legal authority to enforce that easement. Beyond the specific easement in question, effective easement enforcement is also necessary to maintain public confidence in the Conservancy's easement program, maintain the Conservancy's ability to accept tax-deductible easement gifts and protect the Conservancy's tax-exempt status. The purpose of this policy is to provide guidelines and criteria for response to any uses or changes to Conservancy conservation easements that are in conflict with the purposes and restrictions of the easement. This policy also establishes the Property Review Committee to provide oversight for Conservancy response to violations and suspected violations.

Policy:

The Conservancy must enforce the terms of its easements. As soon as the violation is noted, the first response of the Conservancy will be to document the violation and contact the landowner to discuss the situation. Conservancy staff must consult with legal counsel regarding any enforcement action.

Property Review Committee

The Property Review Committee shall consist of the Executive Director, President, Attorney, and one or two Trustees as appointed by the Board of Trustees. The Property Review Committee provides oversight for the Conservancy response to issues of conservation easement compliance.

Landowner Relationships

The first step in improving easement compliance is an effective monitoring program. All easements should be monitored at least once annually (Board Policy 4.B. Monitoring Protected Properties). Monitoring reports should never explicitly say "no violations found," in case a problem has been missed during the visit. Maintain good landowner relations by involving the landowner in the site visit, encouraging them to ask questions, following up with phone calls

and sending the written report to them.

New Landowners

Conservation easements, whenever possible, should include a section in the easement document that requires conservation easement landowners to contact the Conservancy when land changes hands. When there is a new conservation easement landowner, Stewardship Director shall provide a "new landowner introductory package" to ensure that new landowners understand the Conservancy's mission, the conservation restriction for their property, and the concept and purpose of the easement in general. Stewardship Director shall arrange to meet the new landowner to explain easement and the monitoring requirement, provide new landowner with a copy of the baseline document, and to obtain information to update property file.

Types of Violations

Responses to easement violations will vary according to the type and severity of the violation. Violations may be characterized as Minor or Major as follows:

1. Minor: i.e., road-side trash, minor tree cutting
2. Major: i.e., construction, excavation, pollution, timbering
 - a. After the fact / irreversible; requires compensation and /or reclamation
 - b. On-going; requires cease / desist and restore order
 - c. Before the fact / reversible; requires review and analysis

Staff and Board responsibilities

Responses to violations and suspected violations and the responsibilities and roles of Board and staff members are detailed in the following procedure section.

Deadlines for Corrective Actions

Deadline length for the landowner to implement corrective actions following receipt of written notice is indicated in the conservation easement. Longer deadlines must be approved by Property Review Committee.

State and Local Regulatory Agencies

Whenever appropriate, involve other regulatory agencies who may have an interest in the protected property and possible jurisdiction, such as Michigan Department of Environmental Quality in cases of wetland violations or the local community who may have required the conservation easement as part of a planned development agreement.

Legal Defense Fund

Expenditure of funds from the Legal Defense Fund to pay for legal expenses must be approved by the full Board of Trustees. Refer to Board Policy 4.A. Stewardship Funding for guidance on use of Legal Defense Fund.

Procedure:

Notification of Conservancy

Notification of a violation may come from a variety of sources, such as the Conservancy's

regular monitoring visit, random observations by staff member or volunteer, third party (such as a neighbor), local government officials, or from the easement donor. Common violations include dumping, tree cutting, construction without Conservancy approval, property sale without notice, and draining of wet areas. The Stewardship Director is responsible for first response to the violation according to the steps described below and should record all actions in the property file and copy all correspondence to Executive Director. In the event the Stewardship Director is unavailable, the Executive Director will respond.

Noting Violations during Monitoring Inspection

As part of the monitoring visit, thoroughly document any suspected violation(s) with photographs, maps and a written report. If the landowner is along on the monitoring inspection, ask questions for further clarification of the activity or physical modification. Do not state definitively that there is or is not a violation. Complete the monitoring with good documentation. Thank the landowner for their time and tell them that you will follow up with them and send them a copy of the monitoring report. If the landowner is not along on the monitoring inspection, simply complete the monitoring with good documentation.

Initial Response to Suspected Easement Violations

Any suspicions of a conservation easement violation should be reported immediately to the Stewardship Director. Stewardship Director reviews any information or reports provided and reviews the purposes, conservation values, permitted uses and prohibited actions of the conservation easement and visits the site, if necessary, in order to determine whether the violation is minor or major, or that no violation has occurred. Contact with the landowner to discuss suspected violation and, if needed, visit the site to make a determination should be made as quickly as possible after a suspected violation is reported (on the same day or within 24 hours).

1. If the Stewardship Director determines that no violation has occurred, the process ends.
2. If the Stewardship Director determines that a violation has occurred, then he/she determines the type of violation and provides rationale for the determination.
 - a. If it is minor (minor ground disturbance, minor tree cutting, minor dumping) then Stewardship Director consults with the Executive Director and proceeds with the following approved course of action.
 - b. If it is major (construction, excavation, timbering, pollution, wetland filling or draining), then Stewardship Director consults with the Executive Director and proceeds with the following approved course of action.

Minor Violations

Minor Violations follow the following procedure:

1. Stewardship Director contacts the landowner by telephone or personal visit to explain the violation and required corrective action. State deadline for compliance and date for inspection.
2. Immediately follow up the phone call with a letter that reiterates the oral communication. Send a copy to all members of Property Review Committee.
3. Inspect the site at the deadline date. Document site conditions with photographs and written report.

- a. If corrective actions have been implemented, send the landowner a formal thank you letter with a copy of inspection report.
 - b. If corrective actions have not been implemented, send a second letter with a second deadline. Send a copy to all members of Property Review Committee.
4. Inspect the site at second deadline date.
 - a. If corrective actions have been implemented, send the landowner a formal thank you letter with a copy of inspection report.
 - b. If corrective actions have not been implemented, request a meeting of the Property Review Committee to discuss legal action and to transfer violation response to Executive Director and Property Review Committee.
 5. Conservancy attorney sends a letter to the landowner that gives notice of impending legal action unless the landowner undertakes immediate actions that are reasonably calculated to correct promptly the conditions constituting any breach of the terms of the Conservation Easement. Copies are sent to all members of the Property Review Committee and Stewardship Director.
 6. If the breach remains uncured, the Conservancy may exercise any or all of its remedies.

Major Violations:

Major violations follow the following procedure:

1. For major violations, Stewardship Director consults with Executive Director to discuss violation issue and recommend remedies and to transfer violation response to Executive Director and Property Review Committee. Continued actions of Stewardship Director will be under the direction of Property Review Committee. Executive Director contacts Property Review Committee to discuss recommended remedies.
2. Landowner is contacted via telephone or personal visit to discuss the easement violation. Site inspections and landowner meetings for major violations should be conducted by a team of at least two Conservancy personnel: Stewardship Director and/or Executive Director and a Board of Trustees member of the Property Review Committee.
3. Threatened violations or violations in progress may require more immediate action. Review conservation easement document for provisions for waiver of notice in urgent situations.
4. Conservancy attorney sends a letter to the landowner that gives notice of violation and the deadline as stipulated by conservation easement after receipt of notice to undertake actions that are reasonably calculated to correct promptly the conditions constituting any breach of the terms of the Conservation Easement. Copies are sent to all members of the Property Review Committee and Stewardship Director.
5. If the breach remains uncured after the stated deadline, the Conservancy may exercise any or all of its remedies.

Appendix: Conservancy Model Conservation Easement Section 6, 7, and 23.

6. **RIGHTS OF THE CONSERVANCY.** The Owner confers the following rights upon the Conservancy to perpetually maintain the Conservation Values of the Property:
 - A. **Right to Enter.** The Conservancy has the right to enter the Property at reasonable times to monitor the Property. Furthermore, the Conservancy has the right to enter the Property at reasonable times to enforce compliance with or otherwise exercise its rights under, this

Conservation Easement. The Conservancy may not, however, unreasonably interfere with the Owner's use and quiet enjoyment of the Property.

(1) The Conservancy has no right to permit others to enter the Property. However, upon prior arrangement with the Owner, the Conservancy may invite small groups of naturalists, scientists, students, or Conservancy members to enter the Property for educational or scientific purposes under the Conservancy's supervision. The general public is not granted access to the Property under this Conservation Easement.

(2) The Conservancy shall have access to the Property under this Conservation Easement via [ROAD OR OTHER ACCESS AND DESCRIPTION OF THE ACCESS LOCATION].

B. Right to Preserve. The Conservancy has the right to prevent any activity on or use of the Property that is inconsistent with the Purposes of this Conservation Easement or detrimental to the Conservation Values of the Property.

C. Right to Require Restoration. The Conservancy has the right to require the Owner to restore the areas or features of the Property, which are damaged by any activity inconsistent with this Conservation Easement.

D. Right of Enforcement against Trespass. In the event the terms of this Conservation Easement are violated by the acts of trespassers or other third parties that the Owner could not reasonably have anticipated or prevented, the Owner agrees, at the Conservancy's option, to join in any suit, to assign their right of action to the Conservancy, or appoint the Conservancy their attorney-in-fact, for the purposes of pursuing enforcement action against the responsible parties. Notwithstanding anything in this section to the contrary, this section shall not limit the Conservancy's ability to bring any action, wither in law or equity, against the owner for any violation of the Conservation Easement.

E. Signs. The Conservancy has the right to place signs on the Property, which identify the land as protected by this Conservation Easement. The number and location of any signs are subject to the Owner's approval.

F. Limited Vehicular Use. The Conservancy may operate a motor vehicle or other necessary equipment on the property as necessary in any corrective, preservation or recovery action, whether in an emergency or not, as permitted in this Conservation Easement.

7. CONSERVANCY'S REMEDIES. This section addresses cumulative remedies of the Conservancy and limitations on these remedies.

A. Forbearance or Delay in Enforcement. A delay in enforcement or forbearance by the Conservancy to exercise its rights under this Conservation Easement in the event of any breach of any provision of this Conservation Easement by Owner shall not be deemed or construed to be a waiver by the Conservancy of such provision, or of any subsequent breach of the same or other provision of this Conservation Easement, or of any of the Conservancy's rights under this Conservation Easement. No delay or omission by the Conservancy shall impair such right or remedy or be construed as a waiver.

B. Waiver of Certain Defenses. The Owner hereby waives any defense of laches, estoppel or prescription.

C. Acts Beyond the Owner's Control. Nothing contained in this Conservation Easement shall be construed to entitle the Conservancy to bring an action against the Owner for any injury or modification to the Property resulting from causes beyond the Owners' control, including, but not limited to, unauthorized actions by third parties, natural disasters such as unintentional fires, floods, storms, natural earth movement, or even the Owner's prudent action in response to emergency conditions resulting in changes to the Property. The Owner has no responsibility under this Conservation Easement for such unintended injury or modification, except the requirement to cooperate with the Conservancy in any legal action as detailed in section 6.D above.

D. Notice and Demand. If the Conservancy determines that the Owner is in violation of this Conservation Easement, or that a violation is threatened, the Conservancy shall provide written notice to the Owner. The written notice will identify the violation and request corrective action to cure the violation and, where the Property has been injured, to restore the Property.

(1) However, if at any time the Conservancy determines, at its sole discretion, that the violation constitutes an immediate threat of irreparable harm, no written notice shall be required. In such an event the Conservancy may immediately pursue its remedies to prevent or limit harm to the Conservation Values of the Property.

(2) If the Conservancy determines that this Conservation Easement is, or is expected to be, violated, and the Conservancy's good-faith and reasonable efforts to notify the Owner are unsuccessful, the Conservancy may pursue its lawful remedies to mitigate or prevent harm to the Conservation Values without prior notice and without awaiting the Owner's opportunity to cure. The Owner agrees to reimburse all reasonable costs associated with this effort.

E. Failure to Act. If, within 28 days after written notice, the Owner does not implement corrective measures requested by the Conservancy, the Conservancy may bring an action in law or in equity to enforce the terms of the Conservation Easement. In the case of immediate or irreparable harm, or if the Owner is unable to be notified, the Conservancy may invoke these same remedies without notification and/or awaiting the expiration of the 28-day period.

(1) The Conservancy is entitled to enjoin the violation through temporary or permanent injunctive relief and to seek specific performance, declaratory relief, restitution, reimbursement of expenses, and/or an order compelling the Owner to restore the Property.

(2) If a court of competent jurisdiction determines that the Owner has failed to comply with this Conservation Easement, the Owner shall reimburse the Conservancy for all litigation costs and attorney's fees, and all costs of corrective action or property restoration incurred by the Conservancy.

F. Unreasonable Litigation. If a court of competent jurisdiction determines that litigation initiated by the Conservancy against the Owner was brought without reasonable cause or in bad faith, the Owner may ask the court to require the Conservancy to reimburse the Owner's reasonable costs and reasonable attorney's fees in defending the action.

G. Actual or Threatened Non-Compliance. The Conservancy's rights under Section 7 apply equally in the event of either actual or threatened violations of the terms of this Conservation Easement. The Owner agrees that the Conservancy's claim for money damages for any violation of the terms of this Conservation Easement are inadequate. The Conservancy shall also be entitled to affirmative and prohibitive injunctive relief and specific performance, both prohibitive and

mandatory. The Conservancy's claim for injunctive relief or specific performance for a violation of this Conservation Easement shall not require proof of actual damages to the Conservation Values.

H. Cumulative Remedies. The preceding remedies of the Conservancy are cumulative. The Conservancy may invoke any, or all, of the remedies if there is an actual or threatened violation of this Conservation Easement.

I. Cost of Enforcement. All reasonable costs incurred by the Conservancy in enforcing the terms of this Conservation Easement against the Owner, including, without limitation, costs and expenses of suit and reasonable attorney fees, and any costs of restoration necessitated by the Owner's violation of the terms of this Conservation Easement shall be borne by the Owner; provided, however, that if the Owner ultimately prevail in a judicial enforcement action, each party shall bear its own costs except for any unreasonable litigation as provided in subsection 7.F above.

23. SUBSEQUENT TRANSFERS. The Owner agrees to incorporate the terms of this Conservation Easement by reference in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. The Owner further agrees to give written notice to the Conservancy of the transfer of any interest at least 20 days prior to the date of such transfer. The failure of the Owner to perform any act required by this paragraph shall not impair the validity of this Conservation Easement or limit its enforceability in any way.