

Enforcement of Easements

The enforcement of a conservation easement is a critical obligation for a conservation organization. Although the enforcement provision within the easement itself sets the legal arrangement between the landowner and the conservation organization, each conservation organization must also develop a policy and process for addressing potential and actual easement violations.

The following guidance describes both *minimum* and *recommended* contents for title work due diligence. Minimum contents are indicated by “must”; recommended contents are indicated by “should” or “may” statements.

Items recommended by the Center of Excellence to be checked off and completed have a box - .

Minimum contents for title work due diligence are described in the following Treasury Regulations, Land Trust Alliance (LTA) Standards and Practices, and Colorado Open Space Alliance (COSA) Best Practices. The conservation organization must meet these minimum standards for each transaction.

Treas. Reg. 1.170A-14(g)(5)(ii). The Regulations require the easement provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings including, but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

LTA S&P 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 LTA S&P 6G and 11A.)

COSA 5.3. Easement Violations. ...The local government should also develop a written policy outlining how it will respond to potential easement violations including the role of all parties involved, such as attorneys, staff, advisory board, governing board, and partners. When a violation occurs, the local government is obligated to take action to resolve the violations based on the procedures outlined in this policy. It is generally more common to see violations occur following changes in ownership from the original grantor of the easement. This fact highlights the importance of regular communication with current and future Landowners.

Recommended contents set forth in this guidance were developed based on input from conservation organizations (also referred to as “donees,” “grantees,” “land trusts,” or “local governments” throughout this website) and conservation professionals with experience on these topics. Because each project is unique, a conservation organization may tailor recommended contents, as appropriate, to suit an individual property or project.

The foregoing regulations and standards do not provide the Colorado land conservation community with specific guidance on how to enforce against conservation easement violations. The conservation organization should aim to resolve violations in ways that restore properties to a ‘before’ condition, or if that is not possible, that mitigate negative impacts on conservation values or offset negative impacts with other positive impacts. If none of those goals are feasible, the

conservation organization should require compensation for losses in conservation values. That said, it may sometimes be appropriate to allow minor violations to remain without enforcement by the conservation organization. This document attempts to give conservation organizations guidance for creating a policy that provides for processing violation issues when they arise and for making enforcement decisions appropriate for the given situation.

1. **Violations and enforcement policy and/or procedures.** The following guidelines should help establish consistency.

- ❑ The conservation organization has a written policy or procedure for responding to and enforcing violations. Suggested components include:
 - A plan that describes what circumstances require immediate action;
 - Procedures describing steps the conservation organization will take when a violation is suspected. (These steps can be detailed or general in nature. The conservation organization, particularly public entities, may conclude that a general description of steps is appropriate to preserve the organization's ability to modify or add steps to suit a given situation. For example, some public entities have advisory boards to which they take violation issues, while other public entities don't normally take violations to their advisory boards, but may do so from time to time.);
 - Identification of who has organizational authority to negotiate the resolution with the landowner;
 - A process for how the violation and resolution will be documented , including written acknowledgement of compliance with the terms of the easement once the solution has been implemented;
 - A communication process for discussing issues and violation policy with landowners;
 - When and why other parties should be consulted or involved, such as Board of Directors, or other third party consultants,
 - Factors to consider when involving additional parties may include the severity of the violation in addition to potential political, legal, financial, or public opinion ramifications;
 - Guidance on when the conservation organization should turn to legal counsel for advice and assistance;
 - A press kit or media plan for violations that may illicit negative public response;
 - What other entities should be provided copies of the violation and resolution documents and/or included in the process of resolving the violation (e.g., funders);
 - A plan for allocating the time and money required to resolve the violation;
 - Existence of sufficient easement defense funds to enforce the conservation easement and a plan for securing the funds necessary to enforce the easement.
 - **Note:** Land Trust Organizations should consider enrolling in the Land Trust Alliance's Terra-Firma Conservation Easement Defense Insurance and whether the issue you are dealing with could be covered. Have a plan to deal with issues which are not covered by the program.

2. **Issue discovery.**

- Obtain information from the easement monitoring Inspector or other source of information (e.g., landowner, third party) about the potential issue and thoroughly document their account in writing.
- Thoroughly review your conservation organization's violation and enforcement policy and procedures in preparation for applying them to the issue being reviewed.
- Thoroughly review the conservation easement covering the subject property to make an initial determination as to whether the issue presents a potential violation.
- Carefully consider whether to discuss the potential violation with the landowner at this time.

3. Information gathering and review.

- Gather thorough documentation of the nature of the issue. Conduct site visit if necessary. Information collected may include:
 - Location (maps)
 - Photos (past and present), could include aerial photos
 - Recorded description of observation
 - Updated title report
 - Baseline
 - Conservation easement
- Gather information about any relevant history of the project or documentation about the original donor's intent regarding the issue in question.
- Review all documentation and compare previous condition to current condition.
- Review the conservation easement language relevant to the issue again, carefully reviewing the details of the language to determine whether or not a violation has actually occurred.
- Assess the impact of the act or use is having on the conservation value(s).
- Consult a third party: consultant, legal counsel, or other easement holding organization as necessary and appropriate.
- Consult with other staff or board members as appropriate.
- Measure damage to the affected resource.
- Discuss issue with landowner when appropriate, being sure to reach agreement that the activities presenting the violation will be interrupted if their continuation could worsen negative impacts to the property's conservation values.

4. Classification of issue or concern.

- Once the information is gathered, the issue can be classified into one of the following four categories: (i) No issues or concerns, (ii) Management Issue, (iii) Violation of the conservation easement; or (iv) Undeterminable.

- The rationale for the chosen classification should be fully documented.
 - i. **No issues or concerns:** After research, it is determined that the act or use is in fact in compliance with the terms of the conservation easement. It is essential to document the analysis done in reaching this conclusion.
 - ii. **Management issue:** The act or use is not an easement violation, but the conservation organization is concerned that it may develop into a violation in the future.
 - The act or use should be frequently monitored and discussed with the landowner,
 - For example: There are some noxious weeds on the property which if not controlled may negatively impact the conservation values,
 - The landowner should be notified (preferably in writing) if it is a management issue.
 - iii. **Violation of the conservation easement:** The act or use violates the terms of the conservation easement. Classifying violations into the four categories listed below can aid in developing a resolution for the violation. Factors to consider when determining the appropriate classification of the violation may include: size/extent, time (short-term/long-term issue), cost, opportunity/probability of restoration/mitigation, critical conservation value, unavoidable, intentional/inadvertent.
 - **Procedural Violation:** A violation of a technical aspect of the conservation easement terms that does not affect the conservation values. Such a violation does not negatively affect the conservation values (e.g., the easement terms require 60-days' notice prior to construction but less than 60-days' notice was given).
 - **Minor Impact Violation:** A violation that results in minimal negative impact to the conservation values.
 - **Major Impact Violation:** A violation that results in major negative impact to the conservation values.
 - iv. **Undeterminable:** The conservation organization is unable to determine if the act or use is a violation. This may be due to vague easement terms or lack of sufficient information.
5. **Identify when formal notice is required.** If a violation has occurred, language in the conservation easement may require formal notice as soon as the conservation organization has determined that a violation has occurred. Notice is typically required to be written, because that starts the timing outlined in the conservation easement's enforcement provisions. Typically, notice must be sent to the landowner and to any holding and/or funding partners. Since the conservation organization may elect in Step 6 below not to enforce or to delay enforcement, the decision may need to be made before formal notice is sent. Be careful if electing to make an enforcement decision before providing notification, because that may in turn violate terms in the conservation easement.
6. **Potential Enforcement Actions.** The conservation organization has three primary options when addressing a violation: (i) Do not enforce, (ii) Delay enforcing, or (iii) Enforce.
- i. **Do not enforce:** Reasons why the conservation organization may choose not to enforce the violation include:

- Legal counsel has analyzed the issue and has advised not to enforce;
 - There is no significant negative impact to the conservation values;
 - The easement language is vague and does not provide the organization with a solid enforcement case, in which case, amendment of the conservation easement language may be appropriate. (See the Center of Excellence's separate guidance on Amendments.);
 - The landowner is not responsible for the violation.
- ii. **Delay enforcing:** Reasons why the conservation organization may choose to delay enforcing the violation include:
- Easement language that was unclear has been clarified for future use;
 - The conservation organization has educated (or re-educated) the landowner about the easement's terms and desires to give the landowner a reasonable amount of time to remove the violation before enforcing,
- iii. **Enforce:** Potential enforcement actions the conservation organization may choose include:
- Require mitigation of the impacted conservation value(s);
 - Offset the negative impact by creating positive impact to other conservation value(s) on the property;
 - Resolve the dispute through mediation, arbitration or other judicial process;
 - Litigation should be considered a last resort and only if your legal counsel indicates you have a good chance of winning.
7. **Enforcement Steps.** If you choose to enforce, then:
- Initiate the formal enforcement process described in Step 6 above if you have not already done so.
 - Obtain formal organizational approval to take the enforcement action that the conservation organization has settled on in Step 6 above.
 - Identify what staff will take the lead from this point forward. This may be different from staff that have been involved up to this point.
 - Implement the enforcement action. Consider how to interact with your organization's attorney and define the attorney's role. At this stage, you will need to consult with the attorney who regularly represents the conservation organization and is familiar with the conservation easement. If the conservation organization determines a lawsuit is necessary, a different attorney is likely needed for handling any litigation. The conservation organization should consider establishing a pre-existing relationship with a litigation attorney to be ready if and when a lawsuit is determined to be necessary.
 - Prepare the conservation organization for the possibility that it may be sued on the issue.
 - Defend the issue in court if necessary.