

Funds for Stewardship and Enforcement

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(c)(1). Both land trust and government holders of donated conservation easements must have a commitment to protect the conservation purposes of the easement, and have the resources to enforce the restrictions.

LTA S&P 6G. Funds for Stewardship and Enforcement. The land trust has a secure and lasting source of dedicated or operating funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements, tracks stewardship and enforcement costs, and periodically evaluates the adequacy of its funds. In the event that full funding for these costs is not secure, the board has adopted a policy committing the organization to raising the necessary funds.

LTA S&P 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.)

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 6G and 11A.)

COSA 3.6. Financial and Asset Management. ... Based on the number and size of the local government’s land transactions, there should be a dedicated source of funds sufficient to cover the costs of stewardship, enforcement, operations, and maintenance. The local government should have a system for periodically evaluating the adequacy of those funds, and should develop strategies for securing long-term funding.

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.

Although not specified in the Treasury regulations, in order to demonstrate compliance IRC § 1.170A-14(c)(1)], the Conservation Organization must know what resources are necessary to comply. This means the Conservation Organization must know what funds are necessary to protect the Conservation Purposes, as well as enforce and defend the restrictions in the conservation easement. It is further necessary to have the necessary funds or resources in hand, or at a minimum, a plan to secure the funds.

Many variables make it difficult to adequately fulfill stewardship requirements. The greatest variable is planning for unknown events in perpetuity. Beyond that, each easement, each property, each Landowner and each holder has its own characteristics. While this wide variety of variables makes planning difficult, it also makes it imperative.

1. **Summary.** To be qualified to hold charitable conservation easements, a Conservation Organization must meet the following minimum standards:
 - Have a commitment to protect the conservation purposes.
 - Have the resources to enforce the restrictions.
 - Know what funds are necessary to fulfill the first two standards now and in the future.
 - Have the funds in hand or a plan to secure the funds.
 - Have a policy for Donor-restricted and/or Board-dedicated fund for these purposes, if a Land Trust. Government holders should have one or more budget items covering these costs.
2. **Obtaining Stewardship Funds.**

Pursuant to the Treasury Regulations, LTA's Standards and Practices, and COSA Best Practices, at the time of conveyance of the easement, the holder must have the funds, receive the funds, or have a plan to secure the funds necessary for stewardship, enforcement, and defense. Virtually all Land Trusts rely on a stewardship fund for the deposit of funds and funding for perpetual stewardship costs to come from the interest, not principle, of the endowment. Most government agencies rely on sales and use tax revenues to fund stewardship costs. A local government's practices in this area should comport with COSA's Best Practices for having a dedicated source of funds sufficient to cover the costs of stewardship, enforcement, operations, and maintenance. Local governments should also have a system for periodically evaluating the adequacy of those funds, and should develop strategies for securing long-term funding.

There is no required source for these funds; they may already be in hand, they may come from a project funder, they may be fundraised for, or they may come from other sources. In Colorado, the current custom for Land Trusts is to collect all or a portion of the funds from the Landowner.

Conservation Organizations must be diligent in the management of donated funds to ethically and lawfully meet the intended purposes of the donation i.e., a donation made by a Landowner specifically for stewardship purposes may have to be managed in a restricted account.

No specified amount for these funds has been universally identified. However, as discussed above, the amount for each easement should be determined through a planned process. A 2011 Center of Excellence survey of Colorado Conservation Organizations indicated Land Trusts collect a range of stewardship funds from \$5,000 - \$20,000, with an average around \$11,000 per accepted conservation easement. Those Land Trust that had a separate legal defense fund calculation, collecting between \$1,000 - \$4,000 for future legal defense expenses, with an average around \$2,000 per accepted conservation easement.

3. Determining Costs – Stewardship Endowment.

I. Individual Conservation Easement Costs.

- A. Typically based on estimated prudent investment return for endowment contribution.
- B. Endowment contribution may be based upon a flat or variable amount per easement.
- C. Stewardship costs may include staff time, hard costs, and professional fees.
- D. Factors to consider in determining costs (non-inclusive):
 - Annual stewardship budget needs
 - Size of property
 - Number of reserved and/or subdivision rights
 - Neighboring land uses
 - Distance from office location (e.g., travel expenses-hotel, gas, car rental, mileage, etc.)
 - Partner/funding reporting requirements
 - Difficult stewardship items (e.g., Mineral rights, water rights, multiple owners, etc.)
 - Perceived risk of violation
 - Management or affirmative obligations of holder including activities needing approval
 - Public access requirements
 - Public or private Landowner
 - Management Plan requirements
 - Third party rights
- E. IRS recommends not using the appraised value of the conservation easement as a factor.
- F. Funding source (Landowner, funding agency, grants, etc.).

II. Programmatic Costs for the Conservation Organization.

- A. What are the actual annual stewardship costs (this may require tracking)?
- B. What is the actual annual endowment return on principle?
- C. Should adjustments be made to practices 1.A. or 1.B. above?
- D. Are per easement programmatic costs and returns consistent with per easement endowment collections?

III. Periodic Review.

- A periodic review, ideally annually, of stewardship costs should be conducted by the organization to ensure the amount collected per transaction and the amount currently in the endowment is sufficient to meet stewardship obligations.

4. Determining Costs – Easement Enforcement and Defense.

I. Individual conservation easements costs.

- A. Based on flat or variable amount.
- B. Enforcement and Defense costs may include staff time, hard costs, professional fees, etc.
- C. Factors to consider in determining costs (non-inclusive):
 - o Perceived risk of violation
 - o Number of reserved and/or subdivision rights
 - o Third party rights
 - o Estimated TerraFirma premiums (LTA's collective defense program)
 - o Intangibles
 - o Programmatic objectives
 - o Public access requirements
 - o Public or private Landowner

II. Programmatic costs for the Conservation Organization.

- A. What are the actual annual enforcement/legal defense costs?
- B. What is a reasonable likelihood of enforcement/defense action per easement portfolio?
 - E.g., 1 action/100 easements/year
- D. What is a reasonable cost per enforcement/defense action?
- E. What is the expected annual defense cost (B X D)?
- F. What is a prudent worst case scenario? (Each organization should determine this amount. Maybe it is five times E or maybe it is a set number like \$500,000)
- G. What legal defense reserve is necessary to accommodate F?
- H. What is a reasonable per easement defense fee to achieve G?

III. Periodic Review.

- A periodic review, ideally annually, of legal defense costs should be conducted by the Conservation Organization to ensure the amount collected per transaction and the amount currently in place set aside for conservation easement defense is sufficient to fight legal challenges while still maintaining ongoing stewardship obligations.

IV. Insurance.

- The Land Trust Alliance is preparing to offer easement defense insurance through TerraFirma Risk Retention Group LLC beginning in 2013 or 2014. This insurance will not replace the need for a Conservation Organization to have defense funds on hand.
- Several factors need to be recognized when evaluating easement defense insurance:

- At this time, the insurance is not available to government Conservation Organizations.
- Land trusts must qualify for the insurance.
- It does not cover all cases, including condemnation cases.
- Each case requires a deductible payment by the Conservation Organization.
- Per easement premiums vary.
- Participation in the insurance program should be included in planning for easement defense, but the limitations and costs of the insurance must be recognized.

5. Obtaining Enforcement and Defense Funds. Conservation Organizations may rely on several sources of funds for enforcement and defense, including:

- Easement provisions which require the Grantor to pay enforcement and defense costs.
- Collection of funds at the time and in the manner of collection of stewardship funds.
- Existing staff or volunteers, including pro bono legal representation
- Government holders often use staff legal counsel and tax revenues.

6. Managing Dedicated Funds for Land Trust Organizations.

LTA's Standards and Practices require land trusts to have a "policy committing the [stewardship and enforcement] funds to this purpose." Money collected by a land trust should be placed into a restricted or board-designated fund or funds to help ensure that the land trust can fulfill its stewardship, enforcement and defense obligations. It is strongly recommended that these funds not be mingled with other organizational funds. The policy should also provide for investment principles or guidelines. Further, these funds should be designated for their intended uses by the Board, and require Board authorization to deviate from the policy. Land Trust organizations may wish to place stewardship and enforcement/defense funds in separate accounts.