

**Massachusetts Easement Defense Subcommittee
Conservation Restriction Enforcement Policy Guidelines
Revised, April 2006**

I. Why Adopt an Enforcement Policy?

Enforcement of conservation restrictions (CRs) is a fundamental activity of land trusts and public agencies that hold such conservation restrictions. The purpose of an Enforcement Policy is to define the procedures that a conservation restriction holder will follow to ensure that apparent violations are promptly and thoroughly investigated, documented, and acted on in an effective manner that will survive legal scrutiny. A formally adopted Enforcement Policy helps ensure that violations are addressed fairly and consistently in light of all circumstances. Such a policy also demonstrates that the conservation restriction holder takes its responsibilities seriously and is prepared to enforce the terms of restrictions against future violations.

In recognition of the importance of a clear Enforcement Policy, both the Land Trust Alliance and the Massachusetts Easement Defense Subcommittee have recommended that every organization and agency that holds conservation restrictions adopt a written Enforcement Policy.¹

Recognizing that Enforcement Policies must be tailored to the capacity and methods of operation of an individual agency or organization, the level of their existing conservation restriction stewardship expertise and the types of lands that they steward, *this memorandum is not intended to be a sample Enforcement Policy, but rather an outline of the issues that an organization or agency needs to address in its development of its CR Enforcement Policy.* A variety of sample policies are available from LTA's resource library, www.ltanet.org.

II. Enforcement Principles

A. Preparation for Enforcement – Avoiding and Addressing Violations

- Assemble and maintain baseline documentation reports
- Identify the resources necessary to monitor and enforce CRs, including financial resources and expertise dedicated to CR stewardship
- Foster and maintain positive working relationships with landowners
- Monitor regularly and maintain CR and monitoring documentation
- Maintain procedures to discover and resolve potential violations including training, response checklists, documentation and decision-making protocols
- Train staff and board in resolution of enforcement matters

¹ Standard 11 E -- Enforcement of Easements in the LTA Standards & Practices (adopted Sept. 2004) states: *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*

The Operating Principles of the Massachusetts Easement Defense Subcommittee (adopted by MLTC's Steering Committee on 10/7/05) state:

5. Land trusts, state agencies, and municipalities should have an enforcement policy that ensures that conservation purposes and values are maintained and the property restored.

B. Objectives of Enforcement

- Defend the purposes and terms of the CR, the conservation values of the property, and the intent of the original parties
- Prevent or stop ongoing environmental harm
- Restore land to the extent feasible or remediate conservation values
- Discourage any windfall or financial gain accruing to perpetrator of violation
- Maintain and enhance public/donor confidence in organization and land conservation
- Avoid negative precedents
- Evaluate the situation to prevent similar violations
- Maintain positive relationships to extent possible.

III. The Enforcement Policy Components

A. Identify a clear plan for organizational response to reported violations that includes the following elements:

- Name and contact information for the organization's enforcement officer (Executive Director, Stewardship Director, or other person as directed in the Enforcement Policy, as well as an emergency contact if the primary contact is unavailable and swift action is needed).
- Assess reported violations, including whether immediate action is required: Is there ongoing damage or irreparable harm? Is the source reporting the violation credible? What are the risks of inaction?
- Initiate and document contacts with the landowner (and violator if different); verify details of the violation, determine the facts, review the CR and any applicable laws affected by the violation or potential remediation
- Contact any necessary public authority (e.g., Conservation Commission)
- Document specific action steps taken (correspondence, site visit reports, phone calls, attempts to contact owner); include facts (sources, photos, reports) and opinions (interpretations, excuses, assessments) with attention to maintaining credibility and possible evidentiary needs

B. Identify guidelines to assess reported violations: Is it a clear violation or is the CR ambiguous? Is it a willful violation or an accidental one? Are there minor or significant impacts? Is the violation precedent setting? Is it a repeat violation? If you are considering legal action, how strong is your case? What proof do you have? What are the violator's potential defenses?

C. Consider whether "Major" and "Minor" violations will be handled differently in terms of procedures. Note that major violations should be reported to MLTC and/or MACC.

D. Assess organization's or agency's range of potential actions which best achieve the objectives of enforcement. Is affordable legal advice available? What resources are available to seek redress? What

are the violator's resources and defenses? What are the precedential implications for a win or loss? Will the landowner benefit financially for the violation (private inurement)? What are the public relations implications? What other organizations or agencies might assist with enforcement? (including EOE, the Attorney General, MLTC, other land trusts, etc.)

E. Consider alternatives for resolution, including written warning, written acknowledgement of violation by landowner, CR amendment (see sample policy) or formal interpretation ("discretionary consent"), pre-litigation settlement (by agreement, mediation, or arbitration), or litigation. Any final resolutions must be in accordance with the organization's or agency's adopted Enforcement Policy and signed by an individual with delegated authority.

F. Evaluate remediation goals, as feasible and achievable, including remediation of the violation, alternative improvements of parcel to offset damage, alternative conservation benefits (land, program, finance), clarification or amendment of CR (with due consideration for accountability and future enforcement, avoiding negative precedents and publicity, and avoiding private inurement).

G. Implement the final action, including as necessary final documentation and archiving, legal approval of documentation, ratification by Board or their designee, public relations statement, etc.

H. Throughout enforcement process, strive to maintain positive relationships – assume good intentions (hope for the best), but document adequately (prepare for the worst).