

Baseline Documentation and Monitoring —Keys to a Successful Future Defense

by *Rebecca Thornton and Judy Anderson*

A new owner of an easement protected property starts building a house in a field—a restricted “no-build” area covered under a conservation easement held by your land trust. The landowner wants the house in the field because of the fabulous views and is willing to fight the easement in court. You must suddenly gear into action to stop the violation.

The case: every land trust’s nightmare. The reality: this is likely to happen more and more as easement-protected properties change hands. How do you build an easement stewardship program to enable each landowner to understand the terms of their easement, while at the same time preparing for a possible easement violation that will cost tens of thousands of dollars in legal fees?

The answer lies in drafting easements with terms that your organization will truly be able to enforce and monitor; creating clearly understood baseline documentation; establishing a landowner outreach program to assist the owners of easement-protected property in understanding the terms of their easements; and implementing an effective stewardship monitoring program. Remember, acquiring or accepting an important easement is only the first step. The real work lies in monitoring and enforcing the easement *in perpetuity*.

The Baseline File

Before starting the baseline file, think about “perpetuity” and those who will use the information. Future easement monitors must be able to easily understand the property’s features at the time of easement execution as well as changes that have occurred over time. A baseline package should include:

1. An easement map

As land trust staff changes, and as new landowners purchase protected land, it becomes increasingly difficult to interpret an easement’s objective without a comprehensive map. The initial time invested in creating a map that identifies the important landscape features and preservation specifics of the conservation easement is time well spent. For example, if there are reserved building sites or “no build” areas, the map should accurately identify these areas.

In addition, avoid future confusion by creating one map depicting the roads, existing structures, relevant fences and trails, wetlands, water bodies, and any special features you may be protecting (endangered plants, etc.) rather than a series of maps. (Depending on the scale and the map’s resolution, you may not need to survey these internal boundaries.) This will allow the land trust and landowner to understand the easement within the context of the entire property.

The map should be drawn to a scale that allows the reader to understand the easement. Each land trust must decide the level of accuracy needed to document an easement’s specific provisions.

Maps drawn at 1 inch = 200 feet or 1 inch = 400 feet allow for interpretation within 10 to 15 feet. Creating the original map on mylar, rather than on paper, will allow for more durable documentation. Avoid making “blue-line” copies as these fade with exposure to light. As part of the baseline package, consider the importance of clearly

enforceable property boundaries. More land trusts are requiring surveys, or at a minimum metes and bounds descriptions, to ensure that they are enforcing the easement on the right property.

2. Photographs and supporting text

The complexity of the baseline photographs will be determined by the terms of the easement. For example, if the easement controls building size and location, you will need to document in detail the existing size and placement of any relevant structures in addition to the greater landscape. However, if the easement simply establishes “no build areas” or does not regulate building size, you probably will need to concentrate on areas where building can not occur in the future.

Because future easement monitors and future landowners must be able to understand the baseline documentation, photographs should be taken from identifiable points on the property and keyed to a map showing the direction the photo was taken. Photographs should include property lines and all other relevant features. (If the easement controls structures, photograph all existing structures and other improvements.) Wooded areas are difficult to photograph from the ground. If the land trust cannot photograph the property from the air, aerial photographs (at the scale desired) often can be purchased from a company that routinely does fly-overs. The photographs should be numbered and keyed in permanent ink to a baseline documentation map. Include clear descriptions of the location of each photo.

Consider creating three sets of baseline documentation: one for the easement donor, one for the land trust’s monitoring file, and one to be placed in a fireproof, tamper-proof, climate-controlled facility off-site with other original materials and important legal documents (waivers, amendments, important correspondence).

3. Acknowledgment of baseline

Each landowner and land trust representative should sign the baseline documentation, acknowledging the condition of the property at the time of the easement gift. (This is required by the IRS for tax-deductible easements.) Some land trusts create a separate baseline acknowledgment sheet and require notarized signatures. Consider having the landowner and the land trust representative sign each photograph as well as the supporting text. Should there ever be a question as to whether the original photographs have been substituted, or altered, this will clearly document their integrity.

4.A copy of the conservation easement

The conservation map should be attached if possible.

5. A baseline data sheet

This separate, easy reference sheet summarizes the property’s condition at the time of the gift, as well as the restrictions contained in the easement. It should include the name, address and phone number of the landowner, location of the property, acreage, tax identification number(s), list of features and improvements on the property at the time of the donation, as well as any special conditions. It is helpful to design this sheet as a “living document,” allowing the land trust to record dates of waivers and/or amendments as well as any unusual circumstances.

Monitoring

Establishing a regular monitoring program is critical to avoiding potential easement violations. When designing a monitoring program, consider the type of monitoring that best suits the land trust. While individual site visits are very labor intensive, they allow the land trust to observe the property in detail, and create an opportunity to meet with the landowner. Aerial monitoring, on the other hand, can be an effective mechanism to monitor numerous properties within a short period of time, but requires skill in reading the land from the air.

Land trusts should follow up aerial monitoring with a ground check if anything looks suspicious. Each easement should be monitored on an annual basis—regardless of the method. It is preferable to monitor wooded properties in the fall, after the leaves have fallen.

Before monitoring, the land trust should always check property ownership for changes. Notify the landowners of your visits and invite them along or to meet with you before or after the inspection. A letter and followup phone call is recommended. Keep a copy of the notification in the baseline file.

Review the baseline file and previous monitoring records. Bring an easement summary, camera, detailed map, monitoring log, compass, measuring tool, and flagging. Inspect the property checking likely trouble spots (eg. boundaries, no-build areas, etc.).
Note

and photograph any significant changes. After monitoring, fill out the inspection form, sign and date it. Key any new photographs to the map, label and file them in the baseline file. Summarize the findings in a letter to the landowner. The land trust may want to create a standard letter approved by its attorney, since the letter may be referred to in the event of a dispute over an easement violation.

Communication

As protected land changes hands, more and more violations are apt to occur. Consequently, land trusts must ensure that new landowners understand the terms of their easement. As part of this process, building trust between the landowner and the land trust becomes increasingly important. Make every effort to introduce yourself to new owners. Make them feel comfortable, not only with your staff or volunteers, but also with understanding the conservation easement. Maintain a good relationship with the landowner and try to get them involved with your programs and successes.

Violations

A land trust should develop a policy to address violations. If you suspect a violation has occurred, first call the property manager and/or landowner to discuss what you have found in order to clear up any misunderstanding. Follow-up with a letter reiterating what you discovered, noting the details of your conversation with the landowner. If a violation has occurred, the land trust should work in consultation with its legal counsel and the landowner to establish a plan for restoration and a deadline for compliance. Follow up all contacts in writing, using certified mail. Consult a lawyer if the violation continues or if the landowner refuses to cooperate with the restoration plan. Consider court action as a last resort, but follow through with it if necessary!

Failure to enforce even one easement affects the land trust's credibility, results in decreased public support, and undermines easement programs. It is vital that land trusts manage their easement-protected properties well in order to ensure the perpetual nature of conservation easements.

Rebecca E. C. Thornton is the executive director of the Dutchess Land Conservancy (NY). Judy Anderson is director of conservation and community programs for Columbia Land Conservancy, (NY).