



This example can be used as a starting point to create a policy or other document for your own land trust, but should be altered as necessary to reflect your organization’s unique circumstances using guidance found in the *Land Trust Standards and Practices Guidebook* text and corresponding Standards and Practices Curriculum.

Please note: If you are using this material for accreditation purposes, the Land Trust Accreditation Commission’s *Requirements Manual* provides guidance on how the Commission evaluates compliance with indicator practice 11E Enforcement of Easements. The *Requirements Manual* is available at

<http://www.landtrustaccreditation.org/tips-and-tools/requirements-manual>

To search for policies from accredited land trusts on the Learning Center (<http://learningcenter.lta.org>), include the word “accredited” along with your search terms (e.g., conflict interest policy accredited).

11E: Enforcement of Easements

Policy: KMLT holds conservation easements to ensure the perpetual protection of the conservation values of certain privately-owned lands. The durability of a conservation easement is dependent on the easement holder's ability to enforce its terms. Effective enforcement builds public confidence in easements as a land protection tool and in KMLT's ability to protect land in perpetuity. Moreover, US Treasury regulations require that land trusts accepting easements that qualify for tax-exempt status uphold the terms of these easements and maintain sufficient financial capacity to enforce their restrictions. (See Treas. Reg. 1.170A-14(c)(1).)

Occasionally, the terms of a conservation easement are violated by the landowner or a third party. When an easement is violated, KMLT's objective is to restore compliance with the terms of the easement and ensure the perpetual protection of the property's conservation values with the greatest degree of cooperation from the landowner and the least expense to both the landowner and the land trust.

Procedure

The following guidelines and procedures will help assure that appropriate steps are taken to document the violation and notify the landowner of it, and to help KMLT develop a strategy to resolve it so that conservation values are preserved and protected.

1. Guidelines for responding to suspected easement violations

- Respond quickly to all suspected violations and adhere to KMLT's enforcement policy and procedure and to its conflict of interest policy.
- Address all potential violations, no matter how minor, but maintain perspective and keep KMLT's response proportional to the severity and circumstances of the violation.
- Comply with all applicable laws.
- Maintain the conservation purpose(s) of the conservation easement and protect the land's conservation values in perpetuity, in keeping with the documented intent of the original grantor.
- Maintain public confidence in KMLT's ability to enforce easement restrictions generally.
- Take no action that would result in private inurement or impermissible private benefit.
- Protect KMLT's legal rights and financial investment (if any) in the conservation easement.
- Maintain a constructive working relationship with the landowner, if possible.
- Never give a landowner an on-the-spot opinion as to whether a violation has occurred. Do not tell a landowner what KMLT's response will be until the matter has been reviewed by the Property Management Committee.
- Use litigation as a last resort and only when counsel advises that KMLT is likely to prevail in court.
- Act promptly to resolve the issues. The dispute may cause the landowner stress and concern. The longer the matter remains unresolved, the more difficult it may be to find a resolution.

2. Responding to a suspected easement violation

A suspected easement violation may be discovered during an annual monitoring inspection or reported by neighbors, new property owners, or other third parties. In the event of a suspected violation, KMLT will respond as follows:

- A. **Review the easement and documentation of conditions on the property.** After KMLT receives a report of a suspected violation, the president or executive director/program manager reviews the entire easement deed, amendments (if any), baseline documentation report, and monitoring reports to determine whether it is likely that an easement violation has occurred and what specific easement terms may have

been violated. If a legal interpretation of easement terms is needed, KMLT's attorney is consulted.

- B. Inspect and document the suspected violation.** The president or executive director/program manager notifies the property owner that additional inspection is required and then visits the property to inspect and document the suspected violation. Details of the suspected violation are recorded, including location, extent of damage to conservation resources, and size of damaged area. When possible, damage should be documented in quantitative terms, e.g. number of trees cut down, length and width of unpermitted driveway, etc., and is referenced to specific sections of the baseline documentation report and/or reports of monitoring visits conducted before the violation occurred. Photos keyed to a photo point map are taken, signed, and dated by the photographer, and, if possible, compared with photos taken before the violation occurred. Field notes are taken and signed and dated by the person conducting the inspection.

If the landowner refuses to allow KMLT to enter the property to conduct the inspection, the president or executive director/program manager consults KMLT's attorney for advice on how to proceed.

- C. Determine whether and how severe a violation has occurred.** As soon as possible after discovery of the suspected violation, the Stewardship Committee reviews the information gathered during the inspection against the terms of the easement and other documentation. If the Stewardship Committee determines that the easement has been violated, the Stewardship Committee shall decide whether it is a major, minor, or technical violation, estimate the effort and resources KMLT will need to expend to resolve it, and determine what corrective actions KMLT will require the landowner to take. Corrective actions may consist of restoration, remediation and/or damages or compensation. The Stewardship Committee should also develop a timeline for compliance.

Major violation: Any action requiring enforcement that will cost \$5,000 or more to remediate, including human resources and other direct costs incurred by KMLT, or any action that significantly damages the conservation values protected by the easement. Examples: pollution, large-scale dumping, construction of roads or structures, timber harvesting, destruction of habitat.

Minor violation: Any action requiring enforcement that will cost less than \$5,000 to remediate, including human resources and other direct costs incurred by KMLT, or any action that does not significantly damage the conservation values protected by the easement. Examples: roadside trash, minor tree cutting, failure to comply with mowing requirements.

Technical violation: A violation of the terms of the easement that has no discernable impact on conservation values and requires no remediation. Examples: failure to comply with notice requirements when exercising a reserved or permitted right, failure to notify land trust when property is sold, failure to provide KMLT with a management plan as required by the easement. Technical violations can usually be resolved by explaining the terms of the easement to the landowner, securing the landowner's pledge to comply with them, and, when appropriate, granting discretionary approvals retroactively.

D. Considerations in evaluating suspected violations. The Stewardship Committee should consider the following when determining how to respond to a violation:

- Is the violation a clear breach of a specific term of the conservation easement? Or is the easement language ambiguous or silent on the issue?
- Who caused the violation? The original grantor? Successor landowner? Third party?
- Was the violation intentional or accidental? Is it a reoccurrence of a previous violation or the latest in a series of violations by one landowner?
- Were there any mitigating circumstances, such as KMLT's failure to respond to a landowner's questions or requests, ambiguous easement terms, landowner misunderstanding of permitted and prohibited activities? How should these circumstances affect KMLT's response, if at all?
- What is the best way to resolve the violation? Personal Meeting? Demand letter? Litigation? Or alternatives such as negotiation and mediation?
- Are there any parties such as co-holders or backup holders who should be notified of the violation and involved in its resolution? What will be their role?
- Will KMLT's response to the violation set a precedent? How will its resolution affect the credibility of KMLT and its standing in the community?

E. Contact the landowner. The president or executive director/program manager contacts the landowner, and, if possible, meets with him or her to discuss the violation. The president or executive director/program manager listens to the landowner's explanation, asks questions, takes notes, and asks the landowner to voluntarily correct the violation, or at least to cease any further activity until the matter can be reviewed again by the Stewardship Committee. The president or executive director/program manager documents all meetings and sends a follow-up letter to the landowner formally notifying the landowner of the violation and confirming any agreements made with the landowner about the restoration of the property and the schedule for completion of the necessary work. The letter is sent via certified mail, return receipt requested, as well as regular mail, and a copy of it, along with the president or executive director/program manager's notes and the confirmation of receipt, is placed in both KMLT's permanent and working files.

F. If the landowner agrees to restore the property. If the landowner subsequently agrees to restore the property, the president or executive director/program manager immediately sends a follow-up letter that describes the nature and extent of the restoration work to be completed and the agreed-upon schedule for completion of the necessary work. The property is inspected by KMLT on the date by which restoration work is to be completed, and the restoration work is documented with photographs, narrative description, and quantitative measurements. (The documentation, as well as all correspondence with the landowner, is stored in both KMLT's permanent and working files.) After the inspection, the president or executive director/program manager sends the landowner a follow-up letter (certified – return receipt requested and regular mail) stating whether the remediation work has been successfully completed, and thanking him or her if it has. If it has not been completed, a second follow-up letter is sent, firmly stating expectations for compliance and establishing a new deadline. If the subsequent inspection reveals that the work has still not been completed and there is reason to doubt that the landowner truly intends to comply, KMLT's attorney is asked to draft a letter restating the expectations for compliance and mentioning the possibility of legal action. The KMLT Stewardship Committee is advised of all developments regarding landowner compliance and provided with copies of all correspondence. In large and extended remediation, the land trust checks in with the landowner and visits the land during the progress of the work.

G. If the landowner refuses to restore the property voluntarily. If the landowner refuses to voluntarily restore the property, the president or executive director/program manager consults with KMLT's attorney and Board to discuss the violation and develop an enforcement strategy. Potential strategies include:

- Sending a second certified letter demanding cessation of the violation and the immediate restoration of the affected conservation values.
- Seeking formal mediation of the issue with the landowner.
- Searching for a person sympathetic to KMLT who knows the landowner well to intervene with the landowner to prevent litigation.
- Sending landowner a letter proposing formal arbitration in lieu of litigation.
- Initiating litigation to obtain a court order against the landowner.
- If the landowner also violated the law, notifying the government agency responsible for enforcing it.

Judicial enforcement (i.e. litigation seeking a court order or injunction) is time-consuming, expensive, and unpredictable. Even when it appears that KMLT has an airtight case, a judge may rule in favor of the landowner, setting a precedent that may impede future enforcement actions. In any case, taking the landowner to court will likely cause irreparable

damage to his or her relationship with KMLT. Judicial enforcement should be pursued as a last resort. Nevertheless, legal action may be necessary to defend an easement, prevent or stop damage to the conservation values, and obtain full restoration of the property.

3. Potential violation remedies

Ideally, resolution of the violation will result in the restoration of the property to its pre-violation condition. But this is not always possible. In situations where full restoration is not achievable, KMLT may consider additional remedies, such as mitigation payments, amending the conservation easement to include more land or to enhance the restrictions on the existing land, etc. In proposing such remedies, KMLT must take care to avoid giving the impression that a landowner can buy his or her way out of an easement violation. Any remedy short of full restoration must be carefully scrutinized to make sure that it does not confer impermissible private benefit or private inurement on the landowner. The proposed remedy must be approved by the KMLT Board before it is offered to the landowner.

4. Covering the costs of enforcement

KMLT maintains a reserve fund to cover the costs of enforcement and landowners are required to replenish it by reimbursing KMLT for the costs that KMLT incurred in enforcing the easement, as provided in the easement deed. This requirement may be waived, in exceptional circumstances, by the KMLT Board.

KMLT has enrolled in the Land Trust Alliance's TerraFirma conservation easement defense insurance program. Eligible claims for reimbursement of enforcement expenses are submitted promptly.

5. Third party violations

KMLT regards its relationship with owners of conserved land as a partnership in which both parties seek a common goal: effective stewardship of the conserved land. When third parties trespass on conserved land and damage the resources that the owner and KMLT have conserved, KMLT will work collaboratively with the owner to stop the trespass and have the trespasser remediate any damage caused by his or her actions.

KMLT considers third-party violations on a case-by-case basis when deciding what education measures and remedies are necessary. If the trespasser is unwilling to cooperate with the landowner and KMLT, then KMLT may seek a court order (alone or in conjunction with the landowner) compelling the third-party violator to cease activity that violates the terms of the easement and remediate the damage.

6. Managing public relations

An enforcement action may lead to inquiries from the media, neighbors, other landowners, government agencies, and others. When enforcing an easement, particularly if legal action is involved, KMLT designates a spokesperson for the organization and adheres to the following guidelines in managing public relations:

- KMLT does not seek publicity in the event of a violation. KMLT may choose, however, to respond to inquiries, correct misstatements of fact reported in the media, and clarify its role and responsibilities as an easement holder.
- In discussing the violation publicly, KMLT does not attribute motive or intention to the violator. Public statements should instead focus on the fact that the easement was violated and it is KMLT's job to see that the violation is remedied and the conservation values restored to the greatest extent possible.
- KMLT respects the landowner's privacy, particularly when the violation may have resulted from a mistake or misunderstanding. Again, the focus is on the need to remedy the violation, not on the landowner.
- If KMLT is pursuing legal action, it discusses with its attorney what information can and cannot be released before making any public statements about the violation or the enforcement action.

7. Violation prevention strategies

In stewardship of a conservation easement, violation prevention is the best defense. KMLT has adopted the following practices to encourage ongoing landowner compliance with easement restrictions

- Maintain constructive and collaborative relationships with landowners and help them feel connected to KMLT through newsletters, invitations to events and outings, landowner recognition awards, and informal services such as information on enhancing wildlife habitat, good forestry practices, etc.
- Conduct monitoring inspections at least annually and record findings in a written monitoring report. Invite landowners to accompany the monitor on the inspection visit. Use monitoring visits to update baseline photographs and information.
- Track changes in ownership.
- Promptly contact new owners (and work with real estate agents) to ensure that they understand KMLT's mission, the easement restrictions on their property, and the concept and purpose of conservation easements in general.
- Encourage landowners to ask KMLT to review a proposed action whether or not it is contemplated under the terms of the easement in order to avoid a potential violation.
- Periodically send landowners a written summary of the terms of their easements every 3-5 years.