

## Legal Advisory: Assigning the Right to Enforce a Conservation Restriction

*Attorney Advisory Panel of the Mass Land Trust Coalition*

*(E. Wroblecka, Esq.)*

Land trusts in states that follow the Uniform Conservation Easement Act may grant the right to enforce an easement to a third party. The grant must be expressed in the deed. The Massachusetts enabling legislation, which pre-dates the UCEA, does not expressly provide for third party enforcement rights.

However, Massachusetts General Laws chapter 184, section 32 states in part that a CR shall not be unenforceable on account of the government or a charitable corporation having received the right to enforce by assignment. This seems to imply that a land trust that holds a CR may assign the right to enforce that CR to another land trust or to a government entity such as the Attorney General. While it has not been tested in the courts, there is consensus that inserting the following provision into a CR would enable the holder to, at a later date, assign the right to enforce that CR to another land trust or to a government entity. The greatest potential value of this provision is that on the eve of litigation a holder may confer standing to enforce a privately held CR to the Attorney General or to a land trust with a large enforcement endowment that is much better equipped to handle protracted litigation regardless of the possibility of recovering attorney fees down the road if the land trust is successful.

As always, a holder can assign all of its right title and interest in a CR to another land trust or to a government entity, thereby granting the right to enforce the CR to the recipient along with all of a holder's other responsibilities such as dealing with landowner requests for amendments, exercising a reserved right, monitoring, etc. But many potential recipients who are loathe to take on the responsibilities of holding title to a CR in perpetuity, may be open to receiving the right to enforce in a time of critical litigation. Assigning only the right to enforce the CR should be thought of as one of many options a land trust should consider when it discovers a violation and is faced with the prospect of having to enforce the provisions of a CR.

Those who are wary of this provision mentioned the following:

1. What else is a CR except for the right to enforce? The drafters weren't that smart in 1969 to have thought this out.

**Response:** The statute differentiates between the right to "hold" and the right to "enforce" a CR. In addition, the original holder will still maintain the right to enforce. The right to assign is adding another entity to enforce, not diminishing the original holder's right to enforce.

2. Under the principles of common law, you cannot overburden an easement. Assigning one portion of a CR without the entire CR may be characterized as overburdening.

**Response:** True, except that common law is overruled where it is express within a statute and section 32 seems to allow for assignment of the right to enforce. In addition, placing the provision stated below in the CR at the time of the grant puts grantor on notice that grantee may assign the right to enforce.

3. Some were worried that a defendant landowner would challenge the assignee's right to enforce and take an interlocutory jurisdictional appeal all the way to the SJC thereby tying up litigation.

**Response:** That could happen, but it will only happen once and then we will have our answer to whether the courts will allow it. Thought should be given to which case we are willing to use as the precedent setting case.

*Sample Provision for the Model CR for land trusts and government agencies to use-- approved by EOEA*

**Assignment of Right to Enforce:**

In accordance with Section 32 of Chapter 184 of the Massachusetts General Laws, Grantee reserves the right to assign the right to enforce this Restriction, so long as the assignee is a governmental body, charitable corporation or trust, or other entity which at the time of such assignment is qualified to hold this Restriction. Unless expressly stated otherwise in the instrument of assignment, no such assignment of the right to enforce the Restriction shall diminish the rights or benefits held by the Grantee pursuant to this Restriction, and the Grantee retains the equivalent right to enforce this Restriction.

**Attorney Advisory Panel of the Massachusetts Land Trust Coalition  
Notes, December 5, 2006**

Attorneys Present: Greg Bialecki, (Chr.), William Constable, Margaret Wheeler, Richard Evans, Elizabeth Wroblecka, Doug Muir, Greg Peterson, Stefan Nagel, Stephen J. Small, Irene Del Bono (via teleconference), Robert Levite, Gordon Bell  
MLTC Present: Bernie McHugh, Mark Robinson (Sec.)

