Standard 11E1: Conservation Restriction Enforcement Policy

SAMPLE LAND TRUST
CONSERVATION RESTRICTION ENFORCEMENT POLICY

**INTRODUCTION**

The Sample Land Trust (SLT) holds conservation restrictions, also commonly known as “conservation easements”, to protect the conservation values of certain privately-owned land in perpetuity. SLT’s conservation values are enumerated in the SLT Open Space Selection Criteria Checklist. In order to accept tax-deductible gifts and qualify for tax-exempt status, IRS regulations require that an easement-accepting organization commits to upholding the terms of an easement and maintaining the financial capability to enforce the restrictions. (See Treas. Reg. 1.170A-14(c)(1)). The long-term effectiveness of conservation easements in protecting land depends on the easement holder’s ability to enforce its terms. Strong enforcement of easements is needed to build and maintain public confidence in easements as a land protection tool.

SLT considers that each easement violation situation is unique and requires a tailored approach. The goal is to correct the violation with maximum cooperation and minimum expense. The Sample Land Trust (SLT) considers a minor violation any action requiring enforcement which costs less than $5,000 to resolve (including human resources and other direct costs), AND any action that does not have a significant detrimental impact on the conservation values protected by the easement. SLT considers a major violation any action requiring enforcement that costs more than $5,000 to resolve (including human resources and other direct costs) OR any action that has a significant detrimental impact on the conservation values protected by the easement. The following are guidelines to help ensure appropriate actions to document and notify the property owner about the violation, as well as develop a strategy to remedy the situation.

**Overall Guidelines for Violation Response and Enforcement:**

1. Maintain the conservation purpose of the conservation easement.
2. Maintain SLT’s public image both in its ability to enforce specific easements and to achieve its mission overall.
3. Protect SLT’s legal rights and economic value, if any, in the easement.
4. Maintain the most constructive working relationship possible with the landowner.
5. No one person shall make decisions on SLT’s violation responses.
6. No one person shall give a landowner an on-the-spot opinion about whether or not a violation exists.
7. Maintain professionalism and integrity.
8. Where consistent with the foregoing objectives, balance the harm caused by the violation with the cost/benefit of the selected enforcement response.
9. Use litigation as a last resort and only when there is a good legal basis for action.
10. Maintain consistent responses to similar easement violations.

**Violation Prevention Strategies**

## Maintain good landowner relations.

## Conduct annual monitoring and retain a written monitoring report.

## Provide appropriate training to monitors to enable them to better identify possible violations.

## Keep up-to-date records of transfers in property ownership.

## Contact new owners (and real estate agents) to explain SLT’s mission, the restrictions created by a conservation easement on their property, and the concept and purpose of conservation easements in general.

## Ensure sound drafting of conservation easements.

## Maintain good relations with local officials. Notify local land use officers, tax authorities, conservation agents and conservation commissions of properties with conservation easements.

##### STEPS TO TAKE IN THE EVENT OF A POSSIBLE VIOLATION

Possible violations may be discovered in the course of annual monitoring inspections, reported by neighbors or other third parties, or during informal observation. Possible violations should be reported as soon as is practicable to the SLT Stewardship Committee. The Stewardship Committee is responsible for responding to the possible violation and for documenting the response. The response shall include appropriate feedback to the person(s) who first identified and reported the possible violation.

The Stewardship Committee shall take the following actions:

### **Review the Conservation Restriction Terms.** Review the conservation restriction document, baseline inventory, and monitoring reports to determine if a violation has occurred, its exact nature, and when it took place. Consult legal counsel for interpretation if necessary.

### **Document the Violation.** Visit the site to inspect and carefully document the violation. The violation must be described in detail, including location and extent. Photos keyed to photo points on a map should be taken, signed and dated by the photographer. Quantitative measurements of the violation should be noted as appropriate, e.g. area of impact, number of trees damaged. Field notes should be signed and dated by the person conducting the inspection. The narrative should include an explicit comparison with the baseline document or the current conditions report if an original baseline is not available. Note that the site visit may in some instances be more appropriate after or at the same time as meeting with the landowner to discuss the possible violation. If the landowner does not grant SLT permission to enter the property, consult with legal counsel on how to proceed.

### **Contact the Landowner**. Meet with the landowner in person if possible to discuss the violation. Listen to the landowner’s explanation, ask questions, take notes, and ask the landowner to voluntarily correct the violation, or at least to cease any further work until the matter can be further reviewed and discussed.

### If the landowner cannot be contacted by telephone, send a certified letter that specifies the violation and requests a personal meeting to resolve the situation. A copy of the certified letter should also be sent by first class mail. Specify a time frame for contact in the letter. If a response is not received in the time period identified, re-evaluate the situation. If there is no success with repeated attempts at contact and it is a major violation, have the letter delivered to the landowner.

### Document all meetings and write a follow-up letter to the landowner, recording the discussion and confirming any agreements made. In many circumstances it may be appropriate to send this letter by certified mail so there will be proof of receipt.

# Note: Third Party Violations

SLT views its relationships with owners of conserved land as partnerships, based on the belief that we share a common interest in good stewardship of the conserved land. When third persons trespass on the conserved land and damage the resources that both the owner and SLT have conserved, SLT seeks to engage the cooperation of the landowner in working collaboratively to stop the trespass and have the trespasser repair any damage caused.

SLT reviews each third party violation of a conservation easement on a case-by-case basis when deciding what responses and remedies are necessary. If the trespasser is unwilling to cooperate with the owner and SLT, then SLT may explore judicial remedies for the situation.

### **ENFORCEMENT RESPONSE STRATEGIES AND REMEDIES**

### **Voluntary Reparation by the Landowner**. A voluntary, negotiated resolution to a violation is the most common, and highly preferred, solution. Conservation restriction violations may be caused unintentionally by landowners, abutters or other parties who were unaware of or did not understand the conservation restriction. Violators are often willing voluntarily to make reparations. SLT will pursue this route until it is clear that it will be ineffective.

### If the landowner agrees to make reparations, SLT shall send a follow up letter as soon as possible reflecting the nature and extent of the reparation work and the agreed-upon timetable for completion. The site should be revisited on the deadline date, and the reparation should be documented with photographs, narrative description, and quantitative measurements. SLT shall send the landowner a follow-up letter attesting to the satisfactory completion of the work, or otherwise as appropriate.

**Discretionary Approval or Amendment**

In limited circumstances, SLT may consider the use of discretionary approval to resolve the violation: In all cases, the violation must not substantially change the baseline documentation information (e.g., adding a permanent structure or causing permanent or lasting change to the parcel’s topography or habitat), and the violation must not substantially change the parcel so as to nullify or render impracticable or meaningless the purpose, permitted uses, reserved rights, Grantee rights, or any other material provision within the easement agreement.

In limited circumstances, SLT may consider an amendment to the easement agreement, provided that any amendment must strictly conform to SLT’s Conservation Restriction Amendment policy.

Discretionary approval or amendment may only be considered if there is no significant adverse impact to the conservation values, if the approval or amendment will not terminate the perpetual nature of the easement, and if the economic value of the easement is not reduced by the change. Any amendment used to cure a violation which results in an increase in the amount of land under easement must not be used by the owner to justify a charitable contribution tax deduction. SLT must also consider whether the approval or amendment would be controversial within the community or incite negative public reaction.

**Litigation.** Court enforcement is expensive and time consuming, may produce an undesirable outcome, and will likely irreparably damage the relationship between the landowner and SLT. As such, it should be pursued as a last resort. Nevertheless, court enforcement may be necessary to defend a conservation restriction, prevent or stop damaging activities, or obtain restoration. In such instances SLT shall retain counsel to prepare and present the strongest possible case.

**BOARD REPORTS AND APPROVALS**

The Stewardship Committee reports to the Board of Directors the status of current violation investigations and enforcement matters and actions taken in response. For all major violations the Board of Directors must affirm the proposed remedy or response before it is implemented.

**Adopted by the Board at its meeting of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.**