

Reducing the Cost of Conservation Easement Stewardship by Engaging Landowners in Easement Compliance Self-Certification

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BACKGROUND

Conservation easements are the backbone of farmland protection and privately owned open space preservation. If the provisions of conservation easements are not enforced they will become meaningless. Unfortunately there are a number of barriers to conservation easement stewardship, and the track record is not what it should be.

Both public (government) and private (nonprofit) conservation organizations need a practical and cost-effective way to provide oversight to conservation easement restricted land to ensure that the provisions are followed and enforced.

The risk of easement violation becomes more acute as conservation easements age and the land changes hands. Easement donors or sellers typically think long and hard about severing property rights at the time the conservation easement is placed on their land. Generally landowners who voluntarily participate in land conservation programs, especially those who donate easements, are trying to preserve land they love. Voluntary government land protection program participants who are compensated for conservation easements also generally understand and accept the terms of the easement. But new owners may not be fully aware of the terms of the easement on their new property, or they may prefer to ignore the conservation easement, acting as if it does not exist in the hope that no one will notice.

The perpetual nature of conservation easements is both a blessing and a curse. It helps attract easement donations by making them tax deductible and helps justify government investment of public funds, but it creates a very significant long-term responsibility for the easement holder.

Over and over during the past couple decades, new land trusts and new government programs have acquired easements with little or no consideration of future easement stewardship. Government programs often have a mandate to acquire protected acres and get the available program funding out to landowner participants. Nonprofit land trusts and other organizations also tend to focus on attracting donations and protecting parcels of land in order to demonstrate success. With land conservation organizations facing staff and funding limitations, it is little wonder that easement stewardship is placed on the back burner and deferred.

Furthermore, easement monitoring and enforcement is prohibitively expensive on a small scale unless done by volunteers who may be well intentioned but are not professionals. (Easement monitoring by volunteers can and has worked well for some land trusts that operate on a

relatively small scale.) The cost of easement monitoring is the most critical barrier to easement monitoring. Costs associated with easement stewardship arise in three areas:

- Monitoring or regularly checking on the property to see that the easement provisions have not been violated and maintaining adequate records.
- Legal costs associated with enforcing the easement if violations are identified.
- Administrative expenses associated with amending easements to accommodate unforeseen circumstances.

CURRENT SITUATION

Today, despite efforts of organizations such as the Land Trust Alliance and American Farmland Trust to promote good standards and practices for conservation easement stewardship, public and private land conservation organizations that use conservation easements are failing to steward the conservation easements they hold. Without stewardship (perpetual care and maintenance), conservation easements are like a wooden fence. They offer protection for a while, but eventually they stop protecting the land due to rot and neglect.

Many organizations (both public and private) essentially rely on neighboring landowners to report easement violations. This is a particularly poor way to handle stewardship. Instead of pulling the whole community together around land stewardship, it pits neighbor against neighbor and divides the community. This defacto stewardship practice is also flawed because neighbors and others in the community are unlikely to be fully aware of the provisions of the easement.

The challenge facing the land conservation community is to find the most cost-effective way to ensure the integrity of conservation easements and to promote acceptance of existing conservation easements by future landowners. Neither nonprofit organizations nor government agencies have a strong track record of projecting future program costs. Furthermore, the organizations I am familiar with have not really understood what their annual cost of stewardship is; let alone what the projected costs might be over the life of the perpetual easement. The typical response organizations give to the question “what does it cost you to steward an easement?” is either nothing because we use volunteers or a few hundred dollars based on the cost of a visit to the property. I think these answers grossly underestimate current and future costs.

Let’s look briefly at conservation easement stewardship costs on an annual basis. For government agencies and larger land trusts, staff costs can easily be in the range of \$500 to \$1,500 per easement per year. Staff costs, if fully accounted for, include record keeping, landowner contacts, travel, documentation, employee benefits, staff down time, meetings, etc., in addition to time on the property. Full cost of stewardship must also assume an annualized cost for easement legal defense. I’ve seen estimates as high as half a million dollars if the easement holder is attempting to obtain a judgment against a major easement violation. For the purposes of this paper, I’ll estimate an average easement enforcement cost of \$10,000 every 20 years. (It would be a useful exercise for someone to gather data on actual easement enforcement costs for an agency or land trust and to average it across all easements and annualize it.) But for this paper I’ll stick my neck out and guess \$500 per year. Finally, let’s consider the cost of dealing with landowners and potential easement modifications or

amendments. At AFT, my sense is that easement maintenance (as opposed to monitoring) costs average \$500 or more annually.

This “back of the envelope” estimate of annual conservation easement stewardship costs yields: monitoring \$500, legal defense \$500 and maintenance \$500, or \$1,500 annual cost for every easement held. The recommended best management practice for nonprofit organizations is to create a stewardship endowment that will yield enough to cover these costs in perpetuity. Assuming a withdrawal rate of \$1,500 annually and a return on investment of 5 percent after inflation, this means that the average endowment for each easement held should be at least \$30,000. I’m sure we could debate the dollar amount. But my point is that it is a big hairy number that organizations are unlikely to achieve, and that the majority of landowners would balk at if the cost were built into the easement transaction.

AN ALTERNATIVE STEWARDSHIP SYSTEM

LANDOWNER EASEMENT COMPLIANCE SELF-CERTIFICATION

Finding the solution to the problems noted above will be challenging, particularly when you consider it must be retrofit on thousands of different conservation easements, accepted by thousands of landowners and used by hundreds of different organizations. There are three strategies that can lower the cost of conservation easement stewardship without increasing the risk of easement violations:

- Assess the risk of easement violation—it is not the same for all landowners—and focus on the highest risk easements.
- Make the landowner responsible for stewardship of their easement.
- Pool conservation easement stewardship so that economies of scale can be achieved.

ASSESSING RISK

There appears to be a significantly higher risk of easement violation on properties that are no longer owned by the original conservation easement program participant. Either children who inherit the property or buyers are likely to have a different vision for the use of the land than the owners who protected it. (Constraining these conflicting visions for the use of the land in the future is the primary reason many landowners donate easements.) Furthermore, there is some evidence that second or third owners of protected property are not getting much economic benefit from the protected status of the property. Therefore, the risk of second generation protected property owners violating the easement is very likely to be much higher than first generation owners. To my knowledge, this hypothesis has not been tested. I recommend a research project that compares easement violations between first and subsequent generation owners. If, as I suggest, the risk of easement violations is significantly lower on first generation easements, then the standard protocols for monitoring those easements can be lower and less costly.

MAKING THE LANDOWNER RESPONSIBLE

Today the one fairly standard element of conservation easement stewardship (no it’s not ignoring it) is to have a representative of the easement holder visually inspect the property on a regular (annual) basis looking for easement violations. Various organizations have developed standards and practices for easement monitoring. Many nonprofits use volunteers to monitor easement properties. Government agencies generally use paid program staff or

third party inspectors. Most easement holders are assuming that regular inspections will significantly reduce the need for legal defense or they are ignoring the risk altogether. And many organizations are finding that as easements age, landowner concerns and requests for amendments and modifications increase.

I suggest that the land conservation community strongly consider a dramatic paradigm shift and make the landowners themselves responsible for stewardship of the conservation easement on their own property. No, I'm not suggesting the foxes guard the chicken house. I'm suggesting the chickens guard their own house. I believe, based on working with many landowners over the years, that if land conservation organizations give them the responsibility and seek a real partnership approach to land conservation then landowners will step up to the plate and be the best stewards of the land.

THE DEVIL IS IN THE DETAILS

There are four keys to making a landowner-based system of conservation easement stewardship work successfully.

1. Conservation easements should be written to allow all landowner activities that are not expressly prohibited. With a very clear statement of what is prohibited, the landowner should have few questions about whether or not a new activity violates the easement. Easements that are written specifying what activities are allowed on the land and prohibiting all others are more difficult for landowners (and others) to understand but do not necessarily preclude landowners from the stewardship role.
2. The land conservation organizations holding easements should communicate annually with all the program participants to keep them engaged and inspired as conservationists.
3. Landowners would be required to certify in writing that they have not violated any terms of the conservation easement on their property. This would be a standard legally binding document the landowners would sign off on annually. In addition to the benefits of making the landowner a responsible partner in the ongoing protection of their own land, the process would be an annual reminder of their commitment to conservation. Landowners will be much less likely to cheat on the easement if they have to sign a legal document every year saying they did not. America uses a system that is fundamentally the same as this to report our income and pay our income taxes. Contrary to popular belief, most of us voluntarily fill out the forms and pay what we owe.
4. Like the income tax system, there will need to be a process for auditing landowner self-certification, perhaps five years. Auditing will help keep all the program participants honest and further reduce the risk of a significant violation.

The process of self certification will be a good way to get the next generation of conservation easement property owners engaged in the ongoing protection of their new property. New owners of easement protected properties will find it in their best interest to understand the terms of the conservation easement on their property if they have to make a legally binding statement that they are not violating it each year.

A new system of self-certification would not eliminate the need for stewardship endowments for each conservation easement, but it should be able to bring the real cost down to an affordable level. AFT's experience over the past decade has been that it can collect an average of \$10,000 per conservation easement for an easement stewardship endowment fund. Other land trusts have had a similar experience.

POOLING EASEMENTS

It is theoretically possible for each agency and organization to set-up and run conservation easement self-certification programs. It would certainly be easier than each agency and organization trying to operate their own easement monitoring program as they are doing now. But the real efficiencies and cost effectiveness of conservation easement self-certification would be achieved if it was organized and managed on a national scale.

A CAUTIONARY TALE

Recently I had an opportunity to talk with a third-generation dairy farmer in Maryland about their experience in the farmland protection program. Both the farmer and his neighbors were pleased that the farm was protected for agricultural use. The farmer's three children who all hoped to stay in farming were also pleased.

Farmers in Maryland are an endangered species. Those that are surviving are progressive, innovative and looking for new opportunities to make the most of their farms. This farm family not only wants to survive, they want to thrive.

Most farmers in urbanizing areas get several phone calls a year from school teachers asking to bring a class to the farm for a field trip. It's a great opportunity for the kids to learn where their food comes from, and it helps the community retain an appreciation for local farms. It's also pretty much of a nuisance to the farmer, not to mention a potential liability if someone has an accident. Most farmers say no. But this farmer saw it as an opportunity and one he wanted to take advantage of. Not only did he say yes, he converted one of the old outbuildings into a simple classroom/museum and filled it with old farming tools from the hayloft and the attic. His wife developed a few simple things school kids could do, such as churning butter, shelling corn and braiding rope. They started to welcome school field trips, charged a modest fee (about the price of a movie these days) and everyone was happy. Well not everyone. A local government official heard about what was going on and decided it was not agriculture and was therefore prohibited by the farmland protection easement. Today the "museum" stands unused and the kids and the farmer are poorer for it.

Well if first you don't succeed, try again. The lower end of the pasture that had been drained with help from USDA in the 1950s was gradually becoming wetter and wetter. The cows were often up to their ankles in mud after a rain. The site was perfect for the USDA Wetlands Reserve Program—all the experts said so and the application was quickly approved. One day federal, state and local conservation officials visited the farm to kick-off the wetlands restoration process. Only it didn't happen. A local government official (might have been the same one) showed up uninvited and brought the affair to a screeching halt saying that the farmland protection easement did not allow the pasture to be turned into a wetland. It is

apparently irrelevant to this official that God and the cows are slowly turning the pasture into a bog.

The farmer's oldest son just bought a farm in Pennsylvania, and the other two are looking for opportunities off the farm. After three generations this farm family is considering throwing in the towel on farming in Maryland. It's not farmland without farmers.

As I said at the beginning of this paper, failure to do good conservation easement stewardship is a grave threat to conservation easements as a tool for land protection. But easement enforcement based on badly written conservation easements or lacking in common sense will just as quickly kill landowner interest in land conservation programs.

Conservation easement stewardship self-certification can be an effective strategy to reduce the cost of stewardship, and it can also be a great tool for making the landowner a full partner in the ongoing protection of their land resource for the benefit of current and future generations.

SUMMARY

In conclusion, I am suggesting that the quality of conservation easement stewardship will increase if conservation organizations engage the owners of easement-protected land in an annual process of self-certification that the easement has not been violated. I am also recommending two research projects. One that would help quantify the risk of significant easement violation by primary and secondary generations of land owners, and a second that would more accurately determine the potential cost of defending conservation easements against major violations. Finally I have raised the idea that easement stewardship could be more cost effective if easements were pooled and stewarded by a third party organization created specifically to provide conservation easement stewardship services.

The author is the Executive Director of the Land Trust of Virginia. Previously he was Vice President for Programs at American Farmland Trust and for seven years he managed the farmland protection programs in Montgomery County Maryland. The paper outlines his thesis that the high cost of conservation easement stewardship is the most critical barrier to effective stewardship, but that this can be overcome if conservation organizations develop and maintain a good relationship with each landowner and by transferring much of the responsibility for easement stewardship to the landowners themselves. It is based on two decades of experience with agricultural conservation easements.