

Holders, Beneficiaries and Backup Grantees



Defining Roles and Relationships to Achieve Conservation Easement Objectives

A conservation easement may have one or more holders responsible for upholding the easement's conservation objectives. It may have a beneficiary, an entity with some rights to manage the easement in furtherance of the conservation objectives but no responsibility to do so. It may also provide a contingency plan to replace a holder in the event the holder cannot or will not perform its duties. Effective long-term easement management requires that when more than one entity shares easement management rights, the relationship between the entities must be carefully delineated.

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Introduction

By its nature, every conservation easement needs an easement holder—a land trust or government unit that, in accepting the grant of an easement, takes responsibility for proper easement management. Not everyone seeking to conserve a property needs to be an easement holder to assure that their interests, and the conservation objectives of the easement, will be met. The interests of a funder or other crucial conservation partner often may be protected by making them an *easement beneficiary* or *backup grantee*; the relationship between holder and beneficiary or backup grantee may be simpler to manage, more cost-effective and less prone to misunderstandings than the alternative of having each partner serve as a holder. If, however, there is a compelling reason to grant the easement to more than one holder, the holders need to carefully consider and arrange how they will interact with one another to fulfill their easement management responsibilities.

Relationships

Land conservation is based on relationships, the most important being the relationship of the landowner to the land. Quoting Aldo Leopold, "when land does

well for its owner, and the owner does well by his land; when both end up better by reason of their partnership, we have conservation.”¹

A grant of conservation easement seeks to shape a healthy landowner-land relationship, and it expands the relationship to include the easement grantee (called the “easement holder” in this guide). Some grants expand this relationship further, extending certain easement rights and benefits to easement beneficiaries or backup grantees.

This guide examines these relationships and easement management² roles:

- *Easement holder*: The easement holder has both rights and obligations regarding the management of the conservation easement in support of the easement’s conservation objectives. The next section describes the easement holder’s relationships with the land and landowners. The following section investigates the issues that arise when a conservation easement is to have multiple easement holders.
- *Easement beneficiary*: The parties to a grant of conservation easement—those owning the land and the holder or holders—may identify in the grant one or more third-party beneficiaries³ (referred to as “easement beneficiaries”⁴) and the rights these easement beneficiaries may exercise to protect their interests. In contrast with an easement holder, an easement beneficiary has no *obligation* to manage the conservation easement. The guide looks at the advantages of establishing a beneficiary relationship as contrasted with having multiple easement holders and suggests ways to harmonize the rights and powers of the easement beneficiaries with the needs of the easement holder to provide efficient and effective easement management.
- *Backup grantee*: Some grants of conservation easement contain a kind of contingency plan to replace a defunct or non-performing holder with another land trust or other qualified organization (referred to as a “backup grantee”). The guide identifies the ways that a backup grantee

arrangement may be structured and explores how the arrangement dictates the relationship, if any, the backup grantee has to the easement holder, the land or the landowners.

Easement Holder

Easement Holder’s Relationship to the Land

Real Property Interest

The grantee of a conservation easement is called a holder for good reason. The grant of conservation easement conveys a real property interest in the eased land to see that the land’s conservation values are maintained. The holder of this interest holds the power to block uses of the eased land inconsistent with the conservation objectives of the easement. The conservation easement is a vested interest, which means it cannot be taken away by anyone else.⁵ It is a present interest, not a future interest triggered by a contingency.⁶ It exists as a powerful asset of the holder from the moment the grant of easement is signed and delivered.

Easement Management Responsibilities

Simply holding the power to block land uses inconsistent with conservation purposes is not enough; the conservation easement must be managed on an ongoing basis to maintain its viability and effectiveness. Easement management responsibilities, whether dictated by the terms of the grant or by the operation of the law, typically include the duty to monitor the eased property; to keep permanent records of changes in the eased property from baseline documentation; to respond to landowner requests to determine whether a proposed activity is inconsistent with the grant or to interpret the grant covenants as applied to changed circumstances; to review landowner plans and make recommendations to further the conservation purposes of the easement; to consider whether changes to grant covenants further the conservation purposes of the easement; and, when a land use occurs or is threatened that is inconsistent with the conservation purposes of the conservation easement, to wield the power to block it.

Easement Holder’s Relationship with Landowners

From the moment a grant of conservation easement is signed, the easement holder enters into a relationship not only with the landowners granting the easement but with all of their successor owners extending indefinitely through time. The covenants within the grant are the foundation for the holder-landowner relationship as discussed below.

Harmonizing Concurrent Interests

Land ownership is sometimes described as a bundle of sticks because it can be divided into many different interests running concurrently in the same land. One stick might be the right to build a house; another stick—the right to take timber; another—the right of access via an easement; still another—the right to possession via a lease.

Whenever land ownership is broken apart into concurrent interests in the same land, the holders of these interests typically enter into covenants to sort out potential sources of conflict and misunderstandings. For example, leases as a rule explain what changes may or may not be made to the leased premises. Documenting this understanding protects both landlord and tenant by setting clear limits on each of their interests.

The covenants in a grant of conservation easement serve a similar purpose. Clarity as to the sorts of changes to the eased property that are, or are not, consistent with the conservation objectives of the easement protects both landowners and easement holder. The clarity delivered by the covenants promotes harmony and eliminates sources of discord based upon mistaken assumptions.

Participating in Land Use Decisions

The covenants establish a framework for mutual participation by landowners and the holder in key decisions affecting natural and scenic resources within the property. The rights of review and approval granted to the holder over certain proposed changes open the door to a dialogue between holder and landowners as to whether a change would be

consistent with or contrary to the conservation objectives of the easement. The covenant relationship with the easement holder affords landowners the opportunity to call on the holder to interpret the terms of the grant in light of new circumstances and, in some cases, to provide other assistance pertaining to resource management issues.

Multiple Holders

Having multiple holders for a single easement risks confusion or even conflict in the management of the easement. This and the extra costs of redundant management generally make it preferable to avoid multiple holder situations. However, the demands of project funders or other considerations sometimes necessitate having multiple holders. In these cases, the potential for management problems may be minimized if the holders carefully and explicitly set forth their expectations and define their relationship.

Holder Agreement

The term “Holder Agreement” means, for purposes of this guide, a written document evidencing a meeting of the minds among multiple holders as to how easement management responsibilities will be handled. The content of a Holder Agreement will vary depending upon the relationship of the holders. The core issues to be addressed in the Holder Agreement, regardless of the specific relationship, are outlined in the “Independent Easement Holders” section below. The Principal-Agent Easement Holders and Partnering Easement Holders sections that follow identify additional issues that should be addressed with those relationships.

Standards and Practices

Standard 8, Practice J of [Land Trust Standards and Practices](#) states the following:

If engaging in a partnership on a joint acquisition or long-term stewardship project, agreements are documented in writing to clarify, as appropriate, the goals of the project, roles and responsibilities of each party, legal and financial arrangements, communications to the public and between

parties, and public acknowledgement of each partner’s role in the project.

Separate Agreement Versus in the Grant

Holders *may* use the grant of conservation easement to document their arrangements but, if they do, they need to exercise caution for the following reasons:

- Any terms of the Holder Agreement included in the grant become part of the grant. The landowners, as parties to the grant, have rights to enforce those terms and veto changes in them unless otherwise agreed. There is no guarantee that future landowners will be cooperative, and, over time, it is reasonable to expect that adjustments to the Holder Agreement will become desirable.
- The arrangements between the holders as of the easement date will likely change over time. Periodic review and updating of the Holder Agreement to reflect these changes is highly recommended. A Holder Agreement separate from the grant facilitates this updating process and avoids the potential difficulties of formally amending the grant.

Public Notice of Terms

The Holder Agreement is a contract between the holders. Unless there is a specific reason to give future landowners or other persons notice of one or more of its provisions, there is no need to record.

The discussion below of issues to be addressed in different types of Holder Agreements notes, as to specific issues, the reasons why recorded notice of those provisions may be appropriate.

Relationship Between Easement Holders?

- Multiple easement holders⁷ may arrange a relationship between themselves in a number of ways but, for purposes of applying legal rules, the first step is to find the legal relationship that most accurately describes their dealings with each other. The guide discusses three categories of legal relationships:

- *Independent Easement Holders*: Each easement holder exercises its rights and powers under the grant separately and performs its own easement management responsibilities.
- *Principal and Agent Easement Holders*: Each easement holder is free to exercise its rights and powers separately but one (the principal or, in this guide, the “non-manager holder”) depends upon the other (the agent or, in this guide, the “manager holder”) to fulfill easement management responsibilities.
- *Partnering Easement Holders*: The easement holders agree to exercise their rights and powers together, not separately. They share their easement management responsibilities as equal partners.

The arrangements among easement holders need not fall entirely into one category or the other for all easement administration tasks. For example, easement holders may have an understanding that they will act independently of each other except that one holder will act as agent for the other if an easement enforcement action is required.

Independent Easement Holders

The status of independent easement holders is the default if the easement holders do not form any other relationship, intentionally or not. Absent an agreement otherwise, multiple owners or holders of an interest in real estate have no implied duty to cooperate with each other, share any responsibilities or communicate with one another.⁸

Lack of Agreement Causes Trouble

As to routine administrative tasks (monitoring and recordkeeping), performing independently may not be particularly burdensome on the easement holders or the landowner. That is not always the case when key decisions must be made.

Example: A conservation easement is granted to Holder A and Holder B. They each perform their own monitoring and recordkeeping. A proposal is submitted to each for an improvement permitted under the grant subject to review and approval.

Holder A notifies landowner of its finding that the improvement is consistent with easement objectives and, thus, is approved. Holder B notifies landowner of its disapproval. Each submits a separate bill to landowner for the costs of review.

Holder A may be exercising its review responsibilities in good faith but to no avail because, as a practical matter, Holder B has a veto power over Holder A's decision; likewise, the reverse. The landowner is, understandably, confused and dismayed to find that the easement holders have no obligation to (at the very least) discuss their concerns with each other.

Issues to be Addressed by Holder Agreement

As is evident from the above example, easement holders (even independent ones) must work together on certain key decisions for the easement to be managed in a reasonable and efficient manner. A Holder Agreement may be used to set a protocol to be followed when critical decisions need to be made. Some of the issues that may be addressed in a Holder Agreement between independent holders are as follows:

- What events are subject to the protocol set out in the agreement? Some possibilities are requests by the landowner for review and approval; requests for interpretation of grant provisions; request for change in the terms of the grant document; commencement of an enforcement action.⁹
- What is a reasonable period of time for each holder to review and communicate its views to the others?
- If there is no concurrence in the first instance, is there an obligation to meet and/or discuss points of difference so as to find, if possible, a mutually acceptable common ground?
- What happens if there is still no concurrence? How will communications with landowners be handled?

- If the grant is intended to be a qualified conservation contribution for federal tax purposes:
 - Will the holders issue separate contemporaneous written acknowledgments of the gift or issue one signed by each?¹⁰
 - Will they each sign IRS Form 8283? Prudence dictates that both should to avoid jeopardizing deductibility.¹¹
 - Who is entitled to proceeds of condemnation and in what proportions?¹²
- If one but not all of the holders is insured under the [Terrafirma](#) insurance program, what is their understanding as to maintaining conditions of coverage for the easement?¹³
- If funding for stewardship has not been arranged independent of the agreement, what will be the arrangements?

Principal-Agent Easement Holders

Ideally an organization will not become an easement holder unless it is fully willing and able to manage the easement. If it is not willing and able, but needs the right to intervene in certain circumstances to protect its conservation interests, it will instead be better served by becoming an easement beneficiary, as described later in this guide. However, there are instances in which the requirements of a project funder necessitate a unit of government or another organization to be named as an easement holder, whether or not it intends to actively participate in easement management. In such cases, that holder often turns to the other holder to manage the easement. After all, if one holder is investing its time and resources into easement management on its own account, why not let that holder perform for both holders? Seems simple and straightforward but, as discussed below, both holders need to be aware of unintended consequences and potential pitfalls.

Principal-Agent Relationship

An easement holder managing an easement for itself alone answers only to its own governing board. An easement holder managing an easement both for itself and another holder answers to its own governing board and, in its capacity as manager holder, answers to the other holder as well. What legal and ethical concerns must the manager holder consider in taking on this dual role? What about the non-manager holder? Does the law reward its passive approach and let the other holder shoulder all of the burdens? To find the answers to these questions under applicable law, the first step is to categorize the relationship. The category that most closely fits the “one holder providing services for both” scenario is the law of agency. The manager holder is providing easement management services both for itself and as agent for the other holder (its client or, using legal terminology, its principal).

Each Remains Independent

The principal-agent relationship does not alter the independence of each holder and the separate responsibilities of each holder. Each holder remains at all times an independent actor retaining full right and power to act on behalf of itself.

No Long Term Commitment

The principal-agent relationship lasts only for so long as neither holder terminates it; in other words, it is terminable at will. The Holder Agreement may provide for a minimum term or a notice period before termination is effective but, in general, both holders are free to go their separate ways. Neither has made any long-term commitment to the other to take actions or make decisions together, not separately. This is a key feature that distinguishes the principal agent relationship from the partnering arrangement discussed below.

Informal Employment as Agent

The trickiest aspect of the principal-agent relationship is that the parties may form the relationship without realizing or intending it. An agency may be created by implication or course of conduct.

Example: The Township is legally bound by ordinance to be holder of any easement it acquires with municipal funds; however, the Township does not have the staff or the expertise to provide easement management services on a regular basis. The Township sees that it can avoid the burden of management yet still achieve conservation by relying on a second holder, the Land Trust. Over the ensuing years, the Township relies upon the Land Trust to perform all easement management; the Land Trust has assumed the role of easement manager; and the landowners have come to rely upon the Land Trust in that capacity.

Course of Conduct

In the above example, the Land Trust is managing the easement on behalf of itself as well as the Township; thus, whether or not they enter into a formal agreement, a court is likely to resolve issues pertaining to their easement management responsibilities by applying the legal rules governing a principal-agent relationship.

Surprises Await Those Without a Formal Agreement

When the legal rules applicable to agency are applied to an informally created principal-agent relationship, the parties may be surprised by the unintended consequences and pitfalls, for example one holder’s ability to bind the other to a decision or for one holder to be liable for the actions of the other. These surprises may be avoided by good planning and formalizing the relationship with an appropriate Holder Agreement.

Agent’s Authority to Bind Principal

Under the legal rules applicable to agency, the agent is authorized to act on behalf of its principal. This rule protects those who reasonably rely upon an agent’s apparent authority. In the above example, the landowners have become accustomed to dealing solely with the Land Trust on easement management issues; thus, it may be reasonable for them to rely upon the Land Trust’s apparent authority for all easement management issues. If the Township expects to retain its right to approve certain critical management decisions, it needs to make that clear to the Land Trust and landowners.

Agent Acts Under the Control of Principal
 One of the pitfalls of agency is that, as a legal matter, responsibility always remains with the principal – it never shifts to the agent. Thus, in the above example, regardless of the relative knowledge and experience of each, the Township is viewed as controlling the acts of its agent, the Land Trust, including the negligent or wrongful acts of its employees acting in the course of the agency. An indemnity provision in a Holder Agreement, and adequate liability insurance coverage, will help to mitigate these consequences. But the easement holder who allows an agency relationship to be formed by course of conduct may not realize that it is at risk for the acts and omissions of employees of the other holder.

Conflicting Duties

The agent has a duty of loyalty to its principal, which means that the agent must act in the best interests of the principal rather than its own interest. As applied to the above example, this is not a problem so long as both Township and Land Trust are in accord on easement management decisions. But, if not, the Land Trust will find itself in a predicament:

Example: Same facts as above but, upon reporting a potential easement violation to the Township, the Township demands that the Land Trust commence immediate legal action because it is in the Township’s best interests to avoid the public perception that easements are not strictly enforced. Upon further investigation, the Land Trust concludes that there is no immediate danger to natural or scenic resources and that the Land Trust’s mission is furthered by working with the landowners to implement a mitigation plan that will not only restore but enhance resource values of the eased property.

What is the appropriate path for the Land Trust? As agent for the Township, it cannot decline to follow the Township’s directions without breaching its duty of loyalty. On the other hand, if the Land Trust follows the Township’s directions, even though not considered a prudent course of action by the Land Trust board, then the Land Trust violates its duty to act in the best interests of its own organization. Thus,

any Holder Agreement for principal-agent holders that sets a mandatory term of commitment must also make it clear that if conflict occurs (and is not timely resolved), the manager holder has the right to withdraw from the relationship and act only in its own best interests.

Issues to be Addressed by the Holder Agreement

The above discussion suggests that if a principal-agent relationship is desired or inevitable, a Holder Agreement tailored to address key matters is strongly advisable. It is also advisable to formalize and clarify a relationship that has already developed informally. Key issues pertinent to the principal-agent relationship include the following:

- What are the limits of the manager holder’s authority to act on behalf of the non-manager holder? Alternatively, what critical decisions must be referred to the non-manager holder for its separate approval?¹⁴ If an explanation is not included in the grant, whose duty is it to inform the landowners of the limitations on manager holder’s authority to bind both holders?
- Are there any conditions or limits on the ability of either holder to terminate the arrangement? Is there any protocol to follow before severing the relationship? For example, a discussion period, possibly with the assistance of a mediator.
- What compensation is to be paid for easement management services? What is the understanding regarding reimbursement of costs and expenses incurred in the course of easement management?
- What is the stewardship funding arrangement? Who owns the stewardship fund or endowment, if any, associated with the easement? If the stewardship fund is in the custody of the manager holder (but not wholly owned by that easement holder) is the manager holder authorized to withdraw funds to reimburse itself for management costs and expenses? Are there any limits on withdrawal from principal as well as

earnings? Any limits on amount or type of expenses?

- If litigation or other costs and expenses outside ordinary easement management arise, what arrangements apply to funding those costs? Is the manager holder required to fund and seek reimbursement after? Or is there a mechanism for funding an agreed-upon budget for extraordinary easement management costs and expenses?
- What is the manager holder's responsibility to protect the non-managing holder from claims arising out of negligent acts or omissions of its employees and other representatives in the course of easement management activities?

Partnering Easement Holders

Easement holders may form a partnering relationship for a single project (similar to a joint venture in a business context) or may come to form it for a series of projects (similar to a partnership in a business context). The essence of a partnering relationship is that it is a long-term commitment to manage one or more easements together, not separately.

Considerations

Partnering Advantages

Partnering has a number of advantages for holders interested in forming a long-term relationship for easement management purposes:

- Each partner contributes its time and resources to easement management. This is a particular advantage when the strengths of one partner are the weaknesses of the other and vice versa. The two together can accomplish more than each individually when tasks are allocated based upon their relative strengths.
- Partners share information on a continuing basis; they consult with one another; they act as one when dealing with landowners.
- Partners expect that, if disagreements arise, they will work out the difficulty and continue the association. They are willing to forego complete

independence to achieve a solid, long-lasting relationship to their mutual benefit.

- Partnering arrangements may be crafted for a single easement only or the purpose of the association may anticipate a wider range. For example, the purpose may be to arrange for the management of all easements accepted by the non-manager holder during a certain time period or within a certain geographic area.¹⁵

Options to Formalize Association

The association of partnering holders may be informal (whether or not documented by a Holder Agreement) or, if the partners elect, may be formalized as a separate legal entity.¹⁶

Separate Name

The partnering holders may give their association a separate name. For example, the easement grantee may be identified as AB Greenway, an association of A Land Trust and B Land Trust. Public notice of the name is given by filing with the Corporation Bureau of the Pennsylvania Department of State.¹⁷

Separate Identity for Tax Purposes

Whether or not under a separate name, a tax identification number for the association may be obtained to facilitate opening deposit accounts for stewardship and other funding held as partners.

Due Authorization

As a general rule, either partnering holder may enter into binding commitments on behalf of the association. For that reason, the Holder Agreement must identify the key decisions that require the consent of both easement holders to be effective. Landowners need to know this as well; otherwise, either holder may appear to have the authority to bind the association and landowners will be protected if they rely on that authority and their reliance is reasonable under the circumstances¹⁸.

Unwinding

Easement holders considering a partnering arrangement must be candid with one another about their expectations and how they will unwind their association if those expectations are not met. No one

wants to dampen enthusiasm about initiating an exciting collaboration but forever is a long time. Most likely at some point, one easement holder will no longer be willing or able to bear its share of the burdens of easement management. Addressing that eventuality upfront will assure both that there is a fair and orderly path to handle it when it occurs.

Issues to be Addressed by Holder Agreement

The issues arising in a partnering arrangement in a conservation context are much the same as in a business context.

- Do the easement holders intend to formalize their relationship with a separate name and/or separate tax identification?
- Is the partnering arrangement for a single easement or do the holders anticipate that they will pursue other opportunities together? If the latter, how will they differentiate opportunities that ought to be pursued together from opportunities that each can pursue separately?
- What expectations do they have about the investment in time and resources each will make in the project?
- What actions may be taken by either holder on behalf of both and which need approval by both holders?
- What happens if one holder does not meet expectations or is not satisfying its obligations?
- What happens if their actual investments, relative to each other, are not as anticipated?¹⁹
- In the event of a dispute, is there a mechanism to seek a resolution before unwinding the association? Perhaps a good-faith negotiation period facilitated by a mediator? What will be the result if the association is unwound?
- What happens if one wants to transfer its interest as easement holder?
- How is stewardship funding to be held and invested? How are earnings on the fund

allocated? Under what circumstances may the principal be disbursed? What happens if stewardship funding becomes inadequate?

- How will each partnering holder be assured that the other will not take inappropriate credit for the project; or use project contacts or information to the detriment of the other; or otherwise take unfair advantage of this opportunity?
- Will Terra Firma insurance be available for an easement held by the partnering easement holders? What if a separate entity is established for the association? If the insurance is, or becomes, unavailable, what course of action will the holders take?

Easement Beneficiary

An “easement beneficiary” holds some or all the rights of an easement holder but is not burdened with the easement management obligations of a holder. Making an entity an easement beneficiary is often a practical alternative to having multiple holders. The easement beneficiary, though not a signatory to the grant, has a protected interest in the conservation easement.

Rights of an Easement Beneficiary

The grant of conservation easement may provide one or more rights to an easement beneficiary in accordance with the needs and wishes of those involved with the easement transaction. These rights are called “third-party rights of enforcement” under Pennsylvania law.²⁰ Rights might include:

- The exercise of the holder’s rights and duties under the grant if the holder fails to uphold the conservation easement.
- Prior consultation with the holder prior to the holder approving or disapproving a request of the landowners regarding an action subject to the holder’s review.
- Prior approval of any amendment of the grant of easement’s terms.

- Prior approval of any transfer of the holder's rights under the grant.

The rights may be written to apply to all the land subject to the easement or just a portion if that portion is all that is of interest to the easement beneficiary. For example, a local municipality may financially support the placement of an easement on woods adjacent to the local park and thus want to have some beneficiary rights regarding those woods but may be utterly indifferent to the contiguous farmland to be conserved with the same easement.

Advantages of a Beneficiary Role

There are a number of distinct advantages afforded by the role of easement beneficiary.

Rights Not Responsibilities

Unlike easement holders, easement beneficiaries are not responsible for long-term easement management. They are not even responsible for overseeing long-term easement management.

Lowering Risk

Easement beneficiaries are not responsible for the negligent or wrongful acts or omissions of holders.

Direct Access to Court for Enforcement

Easement beneficiaries are recognized under Pennsylvania law as having the right to commence an action affecting a conservation easement without the approval of anyone else.²¹ Unless otherwise modified in the grant or other agreement with the easement holder, they may take action as and when they consider it necessary or advisable to protect their interests, as described in the grant of easement, from easement mismanagement.

Multiple Holders Versus Holder and Beneficiary

There are pragmatic reasons for the parties planning a conservation easement to establish easement beneficiaries rather than multiple easement holders:

- Most of the complexities and pitfalls involved with multiple holder arrangements as described in the preceding sections can be avoided.

- When the grant is being prepared, easement beneficiaries may select those key management decisions that they want to be involved in and leave the rest to the easement holder.
- Listing specific rights of approval accorded to the easement beneficiary in the grant removes the potential for misunderstanding about the authority (apparent or otherwise) of the easement holder to make those decisions without the concurrence of the easement beneficiary.
- Investors in different aspects of a project can be given rights particular to their project interest. The funder of public access trails on one part of the property and the funder of a wetlands restoration project on another part of the property can each be recognized as having rights of approval over issues pertaining to their project investment. There is no need to grant each a conservation easement over the entire property, and then sort out in the grant whether all of the holders, or only some, have the authority over decisions pertaining to trails or wetlands.²²

Holder-Beneficiary Agreement

The easement beneficiary may act independently to exercise its third party enforcement rights without consulting with the easement holder. The potential for precipitous action without notice is a legitimate concern for the easement holder. The holder will want to establish a protocol with the easement beneficiary that affords an opportunity for the holder to discuss concerns with the easement beneficiary and perhaps agree upon a mutually satisfactory course of action. In this respect, the relationship between the easement beneficiary and the easement holder is much like the relationship between two independent easement holders and the core issues to discuss and reach an accord upon are also similar.

- What notices and/or reports must be furnished to the easement beneficiary?
- What notice is an easement beneficiary required to give the easement holder before taking action on its own?

- What arrangements apply to review and approval? The easement holder to review first and communicate its finding to easement beneficiary? What is a reasonable period of time for the easement beneficiary to furnish its approval or rejection?
- If there is no concurrence in the first instance, is there an obligation to meet and/or discuss points of difference so as to find, if possible, a mutually acceptable common ground?

Beneficiaries in Model Conservation Easement

The commentary to the [Model Grant of Conservation Easement](#) (published by the Pennsylvania Land Trust Association) includes provisions for identifying easement beneficiaries and their respective rights.

Backup Grantee

What happens if a holder ceases to function or fails to provide appropriate management (including enforcement) of a conservation easement?

The parties to a grant of conservation easement sometimes address this concern by identifying a “backup grantee”, a public entity or land trust recognized by the parties to the grant as being an appropriate replacement if the easement holder is no longer performing its easement management responsibilities.

This backup grantee strategy involves grafting into the grant of conservation easement a kind of contingency plan to ensure continued and proper management of the easement. But how does the contingency plan work? Several strategies are available:

- Provide an automatic shift to the backup grantee in the event the easement holder fails in its duties;
- Make a recommendation to the court as to a suitable substitute holder in the event that the court finds itself giving an order for a transfer; or

- Authorize an organization to monitor the easement holder’s performance and petition the court to order a transfer of the easement if the performance is inadequate.

A. Automatic Shift to Backup Grantee?

A grant of conservation easement may be written to provide an automatic shift of ownership of the easement if the easement holder fails in its duties.

Legal Concept of a Shifting Executory Interest

A deed of real property to one owner (Owner A) may be made upon condition that, if a certain occurrence happens, title will shift to another owner (Owner B). Owner A enjoys total ownership until such time (if ever) as the triggering event occurs; then title automatically shifts to Owner B, the holder of the future interest. The technical term for this is a shifting executory interest.

Backup Grantee can Hold the Shifting Executory Interest

If the understanding of the parties is that the backup grantee is to hold an executory interest,²³ then the granting clause of the easement must convey *both* the present (but limited) interest to the easement holder and the future (executory) interest to the backup grantee as in the following example:

Landowners grant and convey a conservation easement on the premises to Land Trust A *but if* Land Trust A ceases to exist or fails to enforce this conservation easement, then to Land Trust B.

Pros and Cons

The advantage of the shifting executory interest approach is that it is automatic and needs no court intervention; however, there are some significant concerns for both the present easement holder, Land Trust A, and the future successive holder, Land Trust B:

- There is no independent arbiter, such as a court, to decide whether the condition has occurred or *not before* Land Trust B asserts that it has taken over as easement holder. Land Trust B may simply be second-guessing the handling of an easement management issue by Land Trust A.

Until the dispute is resolved, perhaps by court action, neither may have clear authority to manage the easement.

- Land Trust B risks having an easement fall into its hands without any opportunity to investigate the pertinent facts and circumstances that exist at the time of the transfer. (See the “Acceptance of Appointment” section below for an explanation of safeguards under Pennsylvania law.)

B. Recommendation to the Court?

A grant of conservation easement may be written to recommend to a court the identity of a substitute holder – the backup grantee – in the event a court finds itself giving an order for a transfer of the easement.

Application to the Model Grant

Section 6.01 of the Model Grant of Conservation Easement states that:

If Holder fails to enforce the terms of this Grant, or ceases to qualify as a Qualified Organization, then the Conservation Easement may be transferred to another Qualified Organization by a court of competent jurisdiction.

The model does not identify a particular Qualified Organization because a court exercising its jurisdiction over the disposition of a charitable asset, such as a conservation easement, has complete authority to decide (at the time the issue arises) whether one organization or another is best suited to manage the easement appropriately. The model provision could be modified, however, to make a recommendation to the court but it would be just that – a recommendation. For example, the following sentence could be appended to the provision:

In this event, the undersigned Owner or Owners and Holder recommend that the court transfer the Conservation Easement to [name of Qualified Organization] because of the close match between the Conservation Objectives and the mission and work of [name of Qualified Organization].

The Court Decides

With this approach, the naming of a particular backup grantee serves an informational purpose. If the easement held by a non-performing easement holder is to be transferred by order of a court of competent jurisdiction exercising *cy pres* jurisdiction, the court will decide whether the backup grantee is a suitable substitute to further the purposes of the conservation easement.

Backup Grantee’s Interest in the Easement

If the identification of the backup grantee is merely informational for the court, the named backup grantee is a non-party to the transaction and has no interest at all in the conservation easement. It has no more rights regarding the conservation easement than if it were not named at all. (If it is desired for the backup grantee to have one or more rights, then the grant could be written to provide it rights as an easement beneficiary.)

C. Performance Monitor?

The grant of conservation easement may be written to identify an organization whose role is to monitor the performance of the easement holder and, if it finds the holder defunct or non-performing, to petition the court to remove the easement holder and order the transfer to a substitute easement holder who will enforce the easement. (If a need to petition the court arises, the petitioner may propose itself as the substitute easement holder; also, the grant of easement may be written to identify an organization as both the petitioner and the recommended substitute easement holder.)

The monitor role serves a useful purpose because, otherwise, the typical backup grantee provision is missing a key piece of information: who has the right (other than the state attorney general) to request the court to replace the easement holder?

State Attorney General Has Standing

Any citizen may ask the state attorney general to investigate an alleged dereliction of duty in the management of charitable assets. If the attorney general determines that court action to replace the

holder is necessary and appropriate, the court must allow the attorney general the opportunity to present the case. The attorney general has what is called “[standing](#)”.

Grant of Standing in Easement?

A grant of conservation easement may name an organization to monitor holder’s performance and, if it finds a dereliction of duty, petition a court to transfer the easement to another. However, courts are not bound by private agreements. The court will judge for itself whether the organization has a sufficient connection to the conservation easement to be allowed standing to present its case for replacement of the holder. And what will be allowed in one state will not necessarily be allowed in another.

Not an Option in Pennsylvania

In Pennsylvania, only the state attorney general has standing to commence an action to remove the existing holder for failure to enforce the conservation easement or to enforce the easement itself.²⁴ The backup grantee, just like almost everyone else, must seek the assistance of the Office of the Attorney General to petition the county orphan’s court for removal and replacement of the easement holder. The rationale for this rule is that a neutral arbiter, the Office of the Attorney General, decides in the first instance whether or not evidence brought to its attention, and any further investigation on its part, supports a finding of non-performance on the part of the easement holder.

Acceptance of Appointment

Sometimes land trusts are named as backup grantees without their knowledge or consent. Even those who consent to be named in the grant may not be willing to assume responsibility for a conservation easement without first inquiring into the facts and circumstances: What is the status of the conservation easement, the baseline documentation and the records evidencing performance of easement management responsibilities? What stewardship funding is available to offset the burden of easement management?

To avoid the possibility of an automatic, self-operating transfer, Pennsylvania law²⁵ provides that the backup grantee is not obligated under the conservation easement unless and until it signs and records an acceptance of the obligation.

Holder-Backup Grantee Agreement

An agreement between an easement holder and a backup grantee may or may not be necessary depending upon the backup grantee approach taken. If a backup grantee is named only as a recommendation to a future court in its selection of a substitute easement holder, an agreement would serve no purpose. If, however, the backup grantee is granted an executory interest in the property, both the easement holder and backup grantee need the protections of an agreement addressing the following issues:

- Who decides if the condition triggering removal has been met? Will an independent arbiter be involved? Will the easement holder be given notice and an opportunity to cure if the backup grantee alleges a failure to perform?
- What information, if any, is to be reported to the backup grantee on an ongoing basis; for example, monitoring reports on the eased property. What rights does the backup grantee have to review the easement holder’s management records?
- What rights, if any, does the backup grantee have to the stewardship funds, if any, contributed with respect to the property?

Conclusion

The web of relationships among the land, the landowners, and one or more easement holders, as well as others interested in the conservation of the eased property, are the foundation of conservation. Conservation objectives are best served when these relationships are harmonious rather than adversarial – a partnership furthering the interests of all. Careful analysis and documentation of the roles of each will help to eliminate misunderstandings and mistaken assumptions that often lead to conflict.

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Experts

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Submit Comments and Suggestions

The Pennsylvania Land Trust Association would like to know your thoughts about this guide: Do any subjects need clarification or expansion? Other concerns? Please contact Andy Loza at 717-230-8560 or aloza@conserveland.org with your thoughts. Thank you.

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¹ Leopold, Aldo, *The Farmer as a Conservationist*, 1939.

² Easement management includes educating landowners regarding the conservation objectives of the easement, monitoring the land, reviewing proposed activities that may impact the land's conservation values, interpreting the terms of the grant of easement, enforcing the terms of the grant and otherwise supporting the conservation objectives.

³ The parties to a commercial or other real estate transaction may recognize a non-party as having a protected interest in some aspect of the transaction. This non-party is referred to as a third-party beneficiary.

⁴ The term "easement beneficiaries" means, for purposes of this guide, those persons eligible to exercise third party enforcement rights under the Conservation and Preservation Easements Act (the "CPEA"). As more fully discussed in the guide, [Standing to Enforce Conservation Easements in Pennsylvania](#), the universe of eligible easement beneficiaries is limited to those qualified to serve as holder -- public entities and land trusts.

⁵ As a general rule, the holder has a permanent interest in the conservation easement, not a temporary interest that may be lost to another upon the occurrence of a contingency. The "Backup Grantee" section of this guide

discusses an exception to this general rule—a shifting executory interest.

⁶ For example, the backup grantee holding an executory interest holds a future interest that arises upon the occurrence of a contingency.

⁷ This guide avoids the term “co-holders” because the term may lead some to assume (mistakenly) that there is a particular express or implied relationship among the co-holders. Absent an agreement by the holders, this is not true.

⁸ Generally, co-owners of a real property interest are not fiduciaries with respect to each other. Each co-owner is expected to look after his or her own interest. Dukeminier Krier, *Property*, 3rd ed., 356. With respect to easement management responsibilities, there may be a duty to contribute to the reasonable cost of easement management activities furnished by other holders. The analogy is to the duty to contribute to the reasonable cost of maintenance of a servitude used in common (for example, an access easement). [Restatement 3rd of Servitudes](#) §4.13.

⁹ If the landowner granting the conservation easement is concerned that a particular protocol will be observed, and wants assurance that the Holder Agreement will not change on that point, the protocol may, if acceptable to holders, be included in the grant. An alternative is to provide in the Holder Agreement that the landowners granting the easement have a right of prior approval over changes to the protocol for so long as they own the eased property.

¹⁰ It would be unwise for a holder in a multiple holder arrangement not to issue or co-sign a contemporaneous written acknowledgement in the absence of IRS guidance stating or court rulings finding otherwise. The acknowledgement serves to establish for tax purposes whether goods or services were exchanged as part of the donation. Clearly, goods and services may be exchanged between the donor and one holder but not another.

¹¹ Karin Gross, Supervisory Attorney with the Internal Revenue Service, stated in a private conversation on July 12, 2013 that all holders should sign. The logic was presented that with Form 8283 a holder affirms that it will report any transfer of the property interest with Form 8282. Since one holder could transfer their interest in the conservation easement to another party independent of another holder, each holder’s signature on Form 8283 is relevant. Conversation reported by Andrew M. Loza, Executive Director of Pennsylvania Land Trust Association.

¹² Holders may elect to include within the grant their agreement as to distribution of condemnation proceeds. The

rationale is to put the condemning authority on notice as to the proper distribution of proceeds.

¹³ TerraFirma’s “How It Works” webpage (www.terrafirma.org/how_it_works#how-11 at 9/15/2013) explains that co-held conservation easements are covered only if the following conditions are met:

- Only one aggregate collective policy limit and claim limit.
- Each co-holder seeking coverage would pay a full premium. (The reason for not reducing the premium for co-holders is that multiple holders would increase complexity of case management.)
- Required to consent to joint representation by one attorney.

The primary holder would be the “first-named insured” and would manage the TerraFirma relationship. If necessary, the co-holders would need to designate a primary holder for insurance purposes and execute a written agreement about co-holding roles and responsibilities. The primary holder would be delegated to act for all the other insured co-holders on any claims. Suits between co-holders are excluded (this is called an “insured versus insured” exclusion). If the primary holder has coverage, then the other co-holders may choose not to insure their easements co-held with that primary holder. The uninsured holders would be solely responsible for their legal costs. If the primary holder is not insured, then the co-holders may not exclude the easement from their insured portfolio.

¹⁴ For assurance that all present and future landowners are aware of the issues requiring prior written approval of both holders independently, the grant may include this information for notice purposes.

¹⁵ The manager holder would, presumably, have the right to reject being named as holder if the easement did not conform to its own standards.

¹⁶ Associations between nonprofit organizations have been infrequent in the past but, due to the enactment of the Uniform Unincorporated Nonprofit Association Act adopted in Pennsylvania (part of Act 67 of 2013), nonprofit organizations are likely to avail themselves of greater opportunities for collaborations that do not expose the assets of either partner to the risks of the association. The 2013 Act makes it clear that an unincorporated nonprofit association is to be treated as a separate legal entity from its members. The members of the nonprofit association (for

example, partnering holders) are not liable for the obligations of the association.

¹⁷ The procedure is to file an application for [Fictitious Name Registration](#).

¹⁸ Apparent authority is the “power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from, and in accordance with, the other’s manifestations to such third persons.” [Restatement \(Second\) of Agency](#).

¹⁹ For example, Holder A may understand that it has to invest \$1,000 in management efforts each year and expects Holder B to do the same. If it turns out that Holder B only needs to spend \$500 doing its share, does that change the balance in the relationship? Maybe yes, maybe no, but it’s an issue that partners need to discuss.

²⁰ §3 [Conservation and Preservation Easements Act](#) (Act 29 of 2001) (“CPEA”).

²¹ §5 CPEA.

²² The [Model Grant of Conservation Easement](#) may be adapted to allow different holders to exercise easement rights with respect to different protection areas. For example, Holder A, interested in habitat protection, may be identified as holder of the easement upon the Highest Protection Area and Holder B, interested in sustainable agriculture, as holder of the easement upon the Standard Protection Area. For greater flexibility, a better arrangement is to sort out their rights and responsibilities with respect to different protection areas in a Holder Agreement. Another, less flexible, alternative is to grant separate easements on separate protection areas. Caution is urged when separate easements are to be donated on contiguous land due to the application of federal appraisal standards.

²³Bates, Sylvia, “[Models of Collaboration Among Land Trusts](#)”, March 2006.

²⁴§5 CPEA. The guide [Standing to Enforce Conservation Easements in Pennsylvania](#) discusses the exceptions to this general rule under Pennsylvania law.

²⁵ §3(c) CPEA.