

Backup Grantees

It is vital that every land trust consider what will happen to its assets if the organization ceases to exist or can no longer steward or administer its easements. Land trusts should have a contingency plan for all of their easements in case of such events.

One strategy is to include backup or contingency provisions in the easement. While there are variations on this practice, a backup or “executory” interest grantee is usually empowered to enforce an easement if the original grantee fails to do so, or to take over an easement if the original grantee can no longer manage it.

Backups Grantees/Executory Interests

A land trust must make a provision in its corporate charter for distribution of its assets in case it dissolves; this provides some protection for the land trust’s conservation easements, but it does not assure that the easements will be transferred to an entity that has the commitment and resources to protect the land’s conservation values. Naming a specific backup holder—a “preferred assignee”—in the easement can avoid delay and assure continuity.

A backup holder is usually empowered to take over an easement if the original holder can no longer manage it. The original holder has the primary responsibility for holding and monitoring the easement, and the backup may keep on file a second set of all the documentation relevant to the easement, so that it will be prepared to act if and when the primary holder can no longer manage and defend the easement. Without a specifically designated backup holder, a state’s attorney general usually oversees distribution of a dissolved non-profit’s assets, and the courts can ensure that the purposes of an easement are carried out in the event of the original organization’s demise. Holders can avoid this step by naming an appropriate backup.

Before naming a backup grantee in the easement, the land trust should secure the prior consent of the backup grantee; in some states this is required. Often, the backup grantee or contingency holder will accept an easement only if the primary easement holder agrees to create and maintain complete and accurate files and to collect stewardship and enforcement funds and have them available for transfer.

Some termination provisions allow the backup to take over the easement simply by recording a notice to that effect; others require that a court must first approve the substitution after finding that the primary easement holder has failed in its duties.

Similarly, the easement deed may give another entity the power to enforce the easement along with the primary holder or alone if the primary grantee fails to enforce. However, the easement title remains with the primary easement holder. Unlike reserving the right to transfer a conservation easement in the future, enlisting and naming a backup grantee in a conservation easement should require the contingent grantee’s participation and formal consent.

Benefits of Enlisting a “Named” Backup:

- ❖ Greater defense resources: A primary reason to use a backup holder is to draw on the enforcement resources of another entity. If the backup organization has a vested legal interest in the easement, it has the legal standing to defend the easement in court. And if the backup is a public agency, the agency’s stability over the long term and its financial and legal backing for enforcement actions can be a formidable deterrent to someone contemplating an easement challenge.
- ❖ Strong selling point to landowners: Some landowners may prefer to grant an easement to a local organization or agency when a larger entity agrees to serve as backup. The more landowners can be assured that their land will be protected forever, the more inclined they may be to grant an easement to a less experienced organization.
- ❖ Protection against eminent domain: For nonprofit easement-holding organizations, using a government agency as a backup may provide a degree of protection against eminent domain or condemnation. Private organizations cannot prevent public takings of their properties or easements. Federal property interests, however, usually cannot be condemned by a state, and property interests held by a state agency usually cannot be condemned by a local government or by another state agency.
- ❖ Protection of the easement in the event of dissolution: If the primary holder ceases to exist, the backup assumes all rights and responsibilities inherent in the easement. And as stated above, with a designated backup, the original holder is assured that its easements will be transferred to an appropriate entity in the event the organization dissolves.

Backup holders should have policies that both guide which easements they will accept and ensure that they have adequate resources to steward easements they might receive.

Related LTAnet Resources (available to volunteers and staff of LTA Member land trusts and Partners):

- ❖ *Land Trust Standards & Practices* -- Practice 11G: Contingency Plans/Backups [http://www.ltanet.org/objects/view.acs?object_id=15162]
- ❖ *Land Trust Standards & Practices* -- Appendix 11G1: Contingency Plans/Backups: Grant of Executory Interest, Vermont Land Trust (sample document) [http://www.ltanet.org/objects/view.acs?object_id=16440]
- ❖ *Land Trust Standards & Practices* -- Practice 11H: Contingency Plans for Backup Holder [http://www.ltanet.org/objects/view.acs?object_id=15163]
- ❖ *Land Trust Standards & Practices*, Appendix 11H1, 11H2, 11H3: Contingency Plans for Backup Holder (sample documents) [http://www.ltanet.org/objects/view.acs?object_id=16437] [http://www.ltanet.org/objects/view.acs?object_id=16438] [http://www.ltanet.org/objects/view.acs?object_id=16439]