

Land Protection Agreement Policy and Procedures

Land Conservancy for Kingston, Frontenac, Lennox and Addington

A Land Protection Agreement (also known as a Conservation Easement) is a legal agreement whereby a landowner transfers specific property rights to the Land Conservancy, which is a signatory to the Agreement and holds the easement. The purpose of land protection agreements is to protect the conservation values specified in the agreement and restrict activities and uses of the land that would harm or destroy those conservation values.

1. Purpose of this policy

This Land Protection Agreement (also known as Conservation Easement) policy is intended to

- State clearly the **intention** of the Land Conservancy to maintain and enforce its land protection agreements
- List the **parties** that may be involved with such agreements
- Describe strategies to **prevent** violations and misunderstandings of the restrictions in land protection agreements
- List **examples** of minor non-compliance and major violations of an agreement
- Detail the **planned response** of the Land Conservancy to violations and the possible financial and legal implications
- Comply with the **requirement** to have such a policy in the standards and practices of the Ontario Land Trust Alliance

2. Scope of this policy

This policy applies to all land protection agreements involving the Land Conservancy for Kingston, Frontenac, Lennox and Addington including those agreements where the Land Conservancy is the monitoring agent on behalf of another agency.

3. Agreement enforcement

The general policy of the Land Conservancy is to enforce all restrictions in land protection agreements. It is vital to enforce restrictions in order to honour the original intent of the agreement, maintain public confidence in the Land Conservancy, and avoid risk to the Land Conservancy's legal ability to enforce other parts of the agreement.

In the course of enforcing the Agreement the Land Conservancy will strive to maintain positive and constructive landowner relationships.

This policy and its procedures are to be followed by Land Conservancy personnel for all perceived or actual violations.

4. Parties with an interest in a land protection agreement

4.1. The Land Conservancy

The Land Conservancy is typically a direct party to the agreement, but may serve as monitoring agent for a third party such as Ontario Heritage Trust or the Nature Conservancy of Canada.

4.2. Owners

The land protection agreement must be binding on current and all future owners of the property in question.

4.3. Government

Three levels of government may have bylaws, legislation, or regulations that affect lands to which a land protection agreement applies.

The municipality is not a direct party to the land protection agreement, but its official plan and zoning bylaws dictate the range of permitted land uses for the property. A typical land protection agreement may *preclude* a particular land use even when municipal zoning would allow this land use. The municipality may also be involved with road issues, well/septic requirements, and other matters that suggest need for continuing communication.

The Province of Ontario maintains responsibility for the Land Registry Office and for recording deeds and agreements registered on title. In addition, the provincial government may wish to create a registry of land protected through land protection agreements.

The Ontario government must approve any amendment to a Land Protection Agreement, and if Ecogift status has been granted, the Federal Ministry of the Environment must first approve the amendment.

Federal and provincial governments may mandate actions to control invasive species, climate change, or other unforeseen events.

4.4. Neighbours

Neighbours are not direct parties to any land protection agreement, but may prove vital to maintenance of restrictions identified in the agreement.

4.5. Other

Other parties who may be interested in or require information about a land protection agreement include real estate agents and brokers.

5. Elements of the land protection agreement

5.1. Clear description of conservation values to be protected

All restrictions in land protection agreements should be worded as clearly as possible. Restrictions that do not relate to the purposes of the agreement should not be included. Restrictions that are difficult or impossible to monitor should be avoided. The initial or baseline status with respect to all restrictions must be clearly documented in the Baseline Documentation Report so that breaches of the restriction are provable.

5.2. No amendments envisioned

The Land Conservancy does not intend to allow amendments to a land protection agreement. For this reason references to a method for amending an agreement are not included in the agreement.

Land protection agreements are a trust to the future wellbeing of the planet's ecosystems and are meant to be unchanged. The only acceptable rationale for amendments is to adapt the agreement in order to maintain or achieve the original intent. Examples of unforeseen changes that might give rise to the possibility of an amendment to an agreement include events beyond the control of the signing parties such as a major forest fire or climate change effects. See the document entitled *Amendment Policy for Land Protection Agreements* for further details.

5.3. Notification regarding change in ownership

Every agreement must include a requirement that the Owner notify the Land Conservancy of any change in land ownership.

5.4. Maintenance of insurance

Every agreement must include a section requiring the Owner to maintain a reasonable level of general liability insurance coverage on the property. When monitoring, the Land Conservancy must verify that property tax and insurance payments are up to date.

5.5. Land transfer fee

Every agreement must require that the Land Conservancy be paid a fee each time the property is sold. This fee will be set by the board, covers the ongoing monitoring costs, and builds a reserve in case there is a dispute with respect to a land protection agreement.

5.6. Recovery of costs

Every agreement must include a clause about the Land Conservancy's right to recover enforcement costs in case of a violation by the landowner.

5.7. Successor rights

Every agreement must include successor rights wording that describes what would happen if the Land Conservancy were dissolved.

5.8. Registration of agreement on deed

Every agreement must be registered on title.

6. Prevention of violations

6.1. Monitoring

Property monitoring by Land Conservancy representatives is the first defense (and detection tool) against violations. Each property must be monitored at least annually. Those performing monitoring tasks rely on supporting documentation such as the documents described in the following section (6.2).

6.2. Documentation

Baseline documentation report

The Land Conservancy must prepare a baseline documentation report that clearly describes the land being protected and the restrictions that apply to its use. Accurate and detailed documentation of the status of features subject to restrictions must be assembled. The baseline documentation report and the land protection agreement should use the same language to reference each of the restrictions. A summary of this baseline documentation report should be part of the agreement.

Repository of monitoring information

All monitoring visits should follow the monitoring guidelines of the Land Conservancy and be properly documented and stored in the repository of monitoring visits for the property.

6.3. Communication with involved parties

Education of all parties concerned

The original intention of a land protection agreement may best be honoured through clear and continuing communication with the Owner, who needs to understand at least the following:

- What a land protection agreement is
- Terms of the agreement, including its permanence and the purpose of the restrictions in it
- The baseline documentation report and monitoring visits and monitoring reports and their importance in assuring that the agreement is maintained.

Notification of change of ownership

The Land Conservancy should remind the Owner of the obligation to notify the Land Conservancy of any planned or actual change in ownership, in its yearly written or verbal communications to the Owner relating to its regular monitoring visits.

Education of new owners

In the case of a new landowner or landowners the Land Conservancy should arrange a meeting, if possible prior to the settlement of the transaction, or as soon after settlement as possible. The meeting should be used to explain and discuss the purpose and restrictions in the land protection agreement, and to ensure that the new owner(s) has a copy of the summary baseline documentation report and the land protection agreement. Meeting notes should be taken and kept in the file, and the Land Conservancy file's ownership information should be updated.

Identification of Land Conservancy contact

For each land protection agreement, the Land Acquisition Committee must name the person(s) given authority to contact the owner, and to ensure that the yearly monitoring visit takes place.

7. Some examples of agreement violations

Minor violation is an activity that has resulted in a violation of the terms of the Agreement which has not, and is not expected to have a substantial negative impact on the Conservation Values which are protected by the Agreement.

Examples might include:

- Construction of temporary mobile structures
- Minor damage caused by motorized vehicles
- Dumping of small amounts of inert substances or trash along roadside
- Minor cutting of trees or removal of vegetation beside a pond
- An incident of prohibited hunting, trapping or fishing

Major violation is an activity that has resulted in a violation of the terms of the Agreement and which has had, or is expected to have substantial negative impact on the conservation values which are protected by the Agreement.

Examples might include:

- Construction of a permanent building or dock
- Major damage caused by motorized vehicles
- Dumping of toxic materials or large quantities of refuse
- Significant tree cutting, timbering or removal of vegetation around a wetland
- Prohibited subdivision
- Digging a channel to drain a body of water
- Introduction of livestock into a protected area

8. Dealing with violations of restrictions

Violations may be discovered or brought to the Land Conservancy's attention through a number of means:

- Reported by the Owner to a member of the Land Conservancy
- Reported by a third party such as a neighbour or the municipality
- Detected at monitoring visits or other visits by Land Conservancy personnel

Violations may prove hard to detect.

The Land Conservancy should obtain as much detail as possible in order to help determine the extent of the possible violation.

Note that trespassing is not necessarily a violation of the land protection agreement. The prevention and reporting of trespassing is the responsibility of the landowner. If trespassers cause damage to the property habitat or violate the restrictions in the agreement, the Land Conservancy will support the landowner's efforts to prevent further violation of the restrictions.

8.1. Document

If a violation is suspected during a monitoring visit and the landowner is present, the monitor should avoid statements about potential or actual violation. Simply ask questions to clarify the physical change. If a third party reports a violation, the Land Conservancy should contact the landowner at once to schedule a monitoring visit.

The monitor should determine as far as possible the timing or duration of the violation, the extent, (for example count and measure stumps), and who is responsible for the violation. The monitor should take photos showing what has occurred. Photos should be printed, dated (or date stamped), signed by the photographer, and each location recorded by GPS and compass direction.

The monitor must prepare a written description indicating which restrictions have been violated, compare this to the Baseline Documentation Report, and describe how the violation has affected or may affect the purposes of the agreement.

8.2. Report

The monitor must report the violation to the Land Conservancy board of directors as soon as possible.

8.3. Respond

The board will discuss a suitable response to the violation. Response options may include (but are not necessarily limited to) education, mediation, remediation, mitigation payments, injunctions, litigation, and laying of criminal charges.

Where the violation is reversible, immediate action should be taken with the aim of restoration. Where the violation is irreversible, the required action may include a cease/desist order, compensation, and reclamation.

The board should prepare a written plan of response, with a list of possible options to prevent further violations, repair damage, restore habitat, or remove unauthorized encroachments, and should prepare for legal action if necessary.

The person(s) designated by the Land Conservancy should report the violation to the owner, or follow up with the owner after proper documentation, and explain which restrictions are suspected or known to have been violated, and what the Land Conservancy may do to enforce the agreement. This may be done initially by phone with immediate written follow up. In case of a major violation, the Land Conservancy representative should receive legal briefing before approaching the owner.

If the violation is considered major, the board must report the violation to the Land Conservancy's legal advisor and the Ontario Land Trust Alliance.

The board will report violations to the federal and provincial authorities as required by the relevant legislation.

8.4. Enforce

The board will follow up with whatever steps are needed to enforce the agreement. Mediation is preferable to litigation. A voluntary negotiated resolution to a violation is the most common and highly preferred solution. Many violations are unintentional, or result from lack of full understanding of the restrictions. If there is disagreement over the interpretation of the restriction the parties may submit this to arbitration. For arbitration, a board of three independent arbitrators

will be used; one selected by the Owner, one by the Land Conservancy, and a third selected by the other two arbitrators.

If reparations must be made, a deadline for completion should be immediately established (example 30 or 90 days into the future), and an offer of assistance extended where appropriate. The Land Conservancy must inspect at the deadline for compliance. If the owner has complied, this must be acknowledged in writing. If not, a second deadline may be set in a written communication with a copy to lawyer, and a plan to proceed further if needed.

If a violator persists in a restricted activity the Land Conservancy will seek a temporary restraining order or a permanent injunction from the court. If a violation requires court action, the Land Conservancy will hire appropriate legal counsel and actively participate in the formulation of the case.

8.5. Financial compensation

The Land Conservancy will seek reimbursement from the Owner for any expenses incurred, related to the violation, according to the terms of the agreement.

8.6. Ensure financial preparedness: accumulate a risk fund

Through the land transfer fee and other fundraising mechanisms, the Land Conservancy will add to an “endowment” fund to cover monitoring and agreement enforcement expenses. Enforcement expenses may include documentation expenses, reparation costs, and legal fees. Recovery of costs from a landowner in violation of restrictions may not be achieved, and existing funds must be used and other funds may have to be raised to meet such expenses. The Land Conservancy should always have enough money at minimum to initiate an enforcement action, and ideally to pay for it completely.

8.7. Ensure legal preparedness

The Land Conservancy will obtain legal advice for major breaches of the agreement. The lawyer for any court action is not necessarily the same lawyer who assisted in preparing the agreement. The Land Conservancy must have a lawyer ready to assist at all times.