

City of Concord, New Hampshire Conservation Commission

Conservation Easement Enforcement Guidelines

Adopted October 14, 2020

Conservation easement restrictions on privately owned lands are a durable, cost effective and sound means for the protection of open space, and contribute much to the conservation goals of the City of Concord (“City”) as expressed in Conservation and Open Space section of the City’s Master Plan 2030 (adopted 2008), and the Concord Conservation Commission’s 2017 Concord Conservation Open Space Update. The initial acceptance of responsibility to uphold an easement’s terms, however, requires a robust stewardship program to ensure that the conservation values of the easement remain protected. Ensuring compliance with the terms of conservation easements and other limited property rights is the central requirement to any stewardship program. When the conservation values or easement requirements have been potentially impaired or violated, it is critical to have an established process for notifying the landowner and correct or cure the violation.

The Concord Conservation Commission (“Commission”) is responsible for managing certain conservation easements held by the City in accordance with RSA 36-A:4, I. To ensure consistency and transparency in its stewardship of these conservation easements, the Commission has developed these guidelines. Our research indicates that the Standards and Practices set forth by the Land Trust Alliance (LTA) are widely considered the state of the art for the stewardship of conservation easements in the United States, as held by any qualified entity. Numerous New Hampshire municipalities have adopted them as a framework for administering the conservation easements for which they are responsible. The following Conservation Easement Enforcement Guidelines were derived and adapted from the LTA Standards and Practices.

In establishing these Guidelines, the Commission recognizes that each easement compliance issue represents a unique situation and requires a tailored approach. Often the best approach for resolving problems is candid and open communication rather than unnecessarily formal or adversarial action. In all cases, the Commission strives to protect the conservation values of land encumbered by easements through an enforcement process that is timely, respectful of landowner interests and consistent with the terms of the easement deed.

Standard Operating Procedures

The following enforcement guidelines are intended to assist the Commission by providing a framework for responding to suspected issues of compliance with conservation easement terms. Potential compliance issues may be observed by Commission members, City staff, volunteers, or members of the public. In all cases, a response should be timely, respectful of landowner interests, and consistent with the terms of the easement deed and these guidelines. This guidance is intended for internal use only and does not alter or supersede the terms of any conservation easement deed, nor does it create any additional legal rights or obligations.

A. Conservation Easement Monitoring

The Commission shall conduct periodic monitoring inspections of all of its conservation easements.

These inspections will occur at least once per year, and are typically conducted in June and July. A standard letter will be sent to the property owner in advance of the inspection. Possible easement violations observed during the inspection shall be documented and addressed in accordance with the steps outlined below in Section B, "Determining Whether a Compliance Issue Has Occurred."

In addition to periodic monitoring inspections, additional inspections will be conducted if an easement violation or suspected violation is reported or otherwise discovered. In these situations, the property owner will be notified of the inspection by letter, electronic mail or by telephone, whenever possible.

B. Determining Whether a Compliance Issue Has Occurred

Easement compliance issues take a variety of forms and may result from the actions of the landowner or a third party. Some compliance issues involve uses and actions that are expressly prohibited or inconsistent with the purposes or terms of the easement; other compliance issues involve the failure to take required action. All actions and discoveries should be documented. The following steps should guide the Commission in determining whether a violation has occurred:

1. Gather available information: All potential compliance issues should be reported to City liaison staff member and the Commission chair as soon as possible. The City liaison staff, a designated Commission member, or other investigator assigned by the Commission will gather and document available information on the possible compliance issue in a timely manner.
2. Review the easement deed and other relevant information: Each easement is drafted differently, and careful interpretation is required to determine whether actions and uses in question are in compliance with the terms of the easement. The City liaison staff member or other investigator assigned by the Commission will review the easement, baseline documentation, and monitoring reports to help support interpretation of the pre-existing conditions. Any legal questions regarding the interpretation of the easement shall be referred to the City Solicitor's office for guidance.
3. Inspect the property: When a suspected compliance issue involves damage to or change in the physical condition of the property that has the potential to be inconsistent with the easement terms, the Commission will conduct an inspection as soon as practicable. The inspection should be properly documented with photographs, photo- point maps, narrative and quantitative descriptions as appropriate.
4. Evaluate the need for an immediate response: The City liaison staff member or other investigator assigned by the Commission will determine whether the possible compliance issue places the property or conservation values protected by the easement in immediate danger of irreparable damage.

C. Determining the Appropriate Enforcement Response

Different easement deeds may prescribe different processes for enforcement. In each case, the Commission, in consultation with the City liaison staff member and the City Solicitor's office, should exercise their best-informed judgment to select an enforcement response that complies with the notice and enforcement provisions of the applicable deed and comports with the severity of the compliance issue and the need for a timely and complete remedy. An important additional consideration is the balance

between ensuring legal compliance, and maintaining the relationship that exists between the City and the owner of the property subject to a conservation easement held by the City. Taking steps to maintain a fair and positive working relationship with the owner is in the long-term interest of both parties.

The procedural steps listed here for responding to a possible or confirmed easement violation may be modified based on the specific provisions in the applicable deed or conservation easement instrument.

1. Commission review of easement compliance issue: Following the annual monitoring inspection of conservation easements and resulting report, or following any periodic monitoring inspection, the Commission shall discuss the inspection results and appropriate remedies based on the type of violation. Remedies for minor violations may include corrective action by the landowner (e.g., removal of trash or encroaching personal property from easement area), written agreement to cease a use that violates the terms of the easement (e.g., cessation of mowing in conservation easement), or a restoration plan to be implemented by the landowner (e.g., replanting of trees or restoration of buffer). For major violations or violations requiring an immediate response, or when the landowner refuse to take corrective action, the Commission may authorize the implementation of a remedy by the City liaison staff member, in consultation with the City Solicitor's Office.
2. Initial letter to landowner: Following the identification of a possible violation or concern, the Commission will send a letter to the landowner that identifies the possible violation or concern and asks the landowner to contact the Commission to discuss that possible violation or concern.
3. Resolution following initial letter: The City liaison staff member or a designated Commission member may engage in informal dialogue with the landowner to resolve a compliance issue. This initial dialogue may occur in connection with any inspection of the easement area. The City liaison staff member or designated Commission member may identify and discuss a proposed remedy of any easement violation with the landowner. That proposed remedy, if agreed to by the landowner, will be subject to final approval by the Commission. Following approval of a proposed remedy, a confirming letter will be sent to the landowner by mail or e-mail.
4. Easement violation/enforcement letter: In the event that the initial letter to the landowner and any subsequent communications do not result in an agreed-upon remedy, the Commission will send a notice of easement violation letter to the landowner. Prior to the transmittal of this second letter to the landowner, the City liaison staff member or designated Commission member will:
 - Review applicable deed or conservation easement for required notification of breach procedures.
 - Provide the easement violation letter for review by the City Solicitor's office.
5. Resolution following second letter: Following the transmittal of the notice of easement violation, the City liaison staff member or designated Commission member may communicate with the landowner regarding the easement violation and a proposed remedy following the process outlined above in paragraph B.2. The approval of any proposed remedy shall be reviewed by the City Solicitor's office at this stage.
6. Enforcement action: In the event that the steps outlined above do not result in a resolution of an easement violation, the Commission will review the steps taken and vote whether to refer the

violation to the City Solicitor's office for further action in accordance with the terms of the applicable deed or conservation easement instrument.

7. Emergency circumstances: Under normal circumstances, the Commission will vote before any notice and enforcement steps are taken. Exceptions may be made, however, when deemed necessary such as emergencies. In the event that the City liaison staff member believes that a compliance issue has the potential to cause immediate and irreparable damage to the conservation values, s/he may take immediate action and shall consult with the City Solicitor's office to the extent necessary. All attempts should be made to confer with the Chair of the Commission or other designated Commission member prior to taking action. If attempts to confer are not successful in a timely manner, then s/he may proceed with immediate action and then notify those individuals of the action taken as soon as possible.

D. Implementing the Remedy

Once the City takes enforcement action, it will remain involved until the compliance issue is resolved and all remedial action has been completed.

1. Monitor implementation of the remedy: Any and all actions to remedy the compliance issue, whether agreed upon or imposed, should be carefully monitored and documented by City liaison staff member or designated Commission member to ensure that they are timely and complete.
2. Document the condition of the property: Once the compliance issue is resolved and the remedy implemented, the resulting condition of the property should be documented and added to the easement file. The documentation should include all correspondence, and may include photographs, narrative descriptions, and quantitative measurements, and GPS point and track files, as necessary. Additional site visits should be scheduled as needed to ensure that the remedy has been affected and to prevent further compliance issues.
3. Notify interested parties of resolution: The City liaison staff member or designated Commission should report the outcome of the investigation to the individual who reported the possible violation and to the property monitor, if different from the violation reporter.

E. Covering the Costs of Enforcement

1. Document enforcement costs: City liaison staff should document enforcement costs, beginning with the report of a suspected compliance issue and continuing until the compliance issue is resolved, the remedy is implemented, and the matter is closed.
2. Recover costs as provided under the terms of the easement deed and according to applicable New Hampshire law: Provided that the landowner is directly or primarily responsible for the compliance issue, s/he should be responsible for costs incurred by the City in enforcing the terms of the easement.

F. Documentation and Recordkeeping

All aspects of easement enforcement should be documented and retained in accordance with applicable law and City policy, as amended from time to time.