

# Fact Sheet 5



## *The Cost of Enforcement for Conservation Easement Agreements*

**Standard 11; Practice A:** *The land trust determines the long-term stewardship and enforcement expenses of each conservation agreement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the land trust has a plan to secure these funds and has a policy committing the funds to this purpose. - Canadian Land Trust Standards and Practices (2005)*

So far, land trusts in Ontario have been fortunate in that they have not generally experienced lengthy and costly litigation procedures to defend conservation easement agreements (CEAs). Experiences in the United States have shown that this is a trend that is not likely to continue, and that every land trust should anticipate the need to pay considerable legal defense expenses at some point. This Fact Sheet will introduce the topic and offer some insight to the typical expenses for which a land trust should plan in relation to their CEAs. For more detailed information on this topic, please refer to the Land Trust Alliance publication “*Determining Stewardship Costs and Raising and Managing Dedicated Funds*” chapter one.



It is important to note that all violations require action, which may or may not include legal action. Violations will require the attention of staff and volunteers and can cost the organization considerable resources. Experiences in the United States show that even minor violations can easily cost over \$2,500 to resolve.

### **Types of violation expenses**

Every violation needs to be identified and documented. The land trust needs to contact the landowner to negotiate the terms of resolution, determine the course of action, and conduct site visits to document the conditions. Depending on the severity of the violation, these activities may also require expert advice from biologists, ecologists, foresters, water quality specialists, etc. When anticipating the expenses associated with violations, the land trust should consider some or all of the following:

- staff and volunteer time
- legal counsel fees
- travel
- expert advice
- supplies and equipment

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### **Determining legal defense fund requirements**

Predicting the severity and frequency of violations is a very difficult task. This is made even more difficult in Ontario as we do not have adequate local history upon which to draw. For this reason, the Ontario Land Trust Alliance (OLTA) looks to the experiences in the United States as documented and researched by the Land Trust Alliance (LTA). The considerable research done by the LTA on the topic of CEA enforcement is available from their report "*Conservation Capacity and Enforcement Capability*". This document recommends that each land trust has a minimum of \$50,000 in a legal defense/stewardship dedicated fund, and that any land trust with over 15 easements invests an additional \$1,500 to \$3,000 per additional easement. While this may seem like a considerable sum, especially for smaller land trusts, the repercussions of not having adequate legal defense funds far outweigh the initial investment.

### **Managing legal defense funds**

There are a number of options available for how to manage legal defense funds. Many smaller land trusts may consider combining their legal defense and stewardship funds, while other larger land trusts may prefer to have them managed separately. Both models are completely acceptable but have different implications for the land trust. We will explore each model below.



#### *Combined dedicated funds*

Combined dedicated funds is when the land trust develops one dedicated fund to support both stewardship activities and legal defense. It has characteristics of both an endowment fund and a capital fund. Like an endowment, the interest earned from the dedicated fund is used to support the annual monitoring and stewardship activities for the CEA. However, unlike an endowment, in the event of a violation, the land trust has the ability to draw down the principal to fund legal defense activities. This option is not a true endowment fund, as the principal of the fund can be withdrawn. While this option is popular with smaller land trusts, there is a risk that funding for both annual stewardship activities and future easement defense could be compromised if the land trust finds itself in the middle of two or more CEA legal battles at the same time which result in significant depletion of the fund.

#### *Separate legal defense funds*

Some land trusts make the decision to manage their stewardship funds as true endowment funds, and establish a separate dedicated capital fund for legal defense. The principal of the separate dedicated fund can be used for enforcing easements. Contributions for individual conservation easements can be greater than \$5,000, depending on how many CEAs the organization holds. In order to establish the recommended \$50,000 fund, the initial investment from the first easement may be considerable.

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Other options for managing funds and specific examples of defense cases from the United States can be found in the Land Trust Alliance publication “*Determining Stewardship Costs and Raising and Managing Dedicated Funds*”.

The information provided is based on the Land Trust Alliance publication, “*Determining Stewardship Costs and Raising and Managing Dedicated Funds*,” Chapter 2. Please refer to this publication for more detailed information and case studies.



This document was reviewed and approved by the Best Practices Working Group on March 16, 2012. To access a copy of the full Land Trust Alliance manual please visit [www.landtrustalliance.org](http://www.landtrustalliance.org).