

BY Barb Welch and Tom Pierce

# EASEMENT REVITALIZATION: MANAGING PROBLEM EASEMENTS

**T**he stewardship director returns to the office after a monitoring visit and knocks on the executive director's door. "I think we have a problem."

The executive director has a sinking feeling he knows just where that problem is located. Sure enough, it's that 2.5-acre suburban lot—one of the first easements accepted by the infant land trust 30 years ago. At the time an exciting first project, it's a property that would never meet the land trust's current criteria for conservation value and public benefit. Cobbled together with language from other documents, the easement has a number of conflicting provisions, including a provision that scenic views should be protected but also a prohibition on cutting of trees within that view corridor.

The stewardship director reports a beautiful large oak was just reduced to firewood, despite the tree-cutting prohibition. Additional clear-cutting revealed an outbuilding not mentioned in the easement's property description. With no baseline documentation ever prepared, it's unclear whether the building existed when the easement was signed. The landowner, three times removed from the original donor, is antagonistic. The executive director expects it will be a difficult battle to enforce compliance and

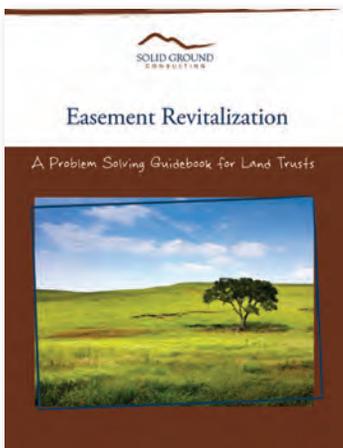
wonders whether even the best outcome will be worth the time and money it will cost.

## **"Let sleeping dogs lie" is not a management tool**

The above hypothetical scenario plays out frequently in various ways all over the country in land trusts large and small. Easements with flaws like the one above lurk in many land trust portfolios, ready to awaken and bare their teeth.

Notwithstanding the risk of doing so, the common temptation is to ignore these easements—do a minimal drive-by each year to monitor them and cross your fingers as you hope for another year with no surprises. That's the approach our hypothetical land trust has taken, and it hasn't worked out. Now it faces multiple potential violations on an easement it promised the public it would protect forever. Ignoring the violations has potential repercussions ranging from loss of credibility with the grantor landowner or the general public, tacit approval to the current landowner to make even more changes to the land, questions from the land trust's funders about the credibility and efficacy of the land trust and, if egregious enough, a risk of potentially losing status as a qualified holder under IRS regulations, not to mention the potential damage to all land trusts' reputations.

Right now our hypothetical executive director wishes he had invested more time on "taming the sleeping dog." But what would that look like? Is it possible, given the constraints and myriad priorities a land trust faces?



Download *Easement Revitalization: A Problem Solving Guidebook for Land Trusts* at [www.osiny.org/EasementGuidebook](http://www.osiny.org/EasementGuidebook).

Sponsored by the Open Space Institute, Solid Ground Consulting worked with six land trusts to analyze real problem easements and evaluate the best tools for managing them. *Easement Revitalization: A Problem Solving Guidebook for Land Trusts* presents the comprehensive findings. Below is a preview.

### Familiarity with the toolkit

One of the reasons land trusts avoid their problem easements is that they think the cause is hopeless. In many cases, that's because they don't know that tools are available for fixing some of the problems a land trust may find in its easements. Amendments can clean up vague language or tighten restrictions. Corrective deeds or "contract reformation" can correct technical and other errors. Boundary surveys can clear up property descriptions. Current conditions reports can fill the gap of missing baselines. These are just a few of the tools discussed in *Easement Revitalization*.

### Working with landowners

Tools alone do not fix the problem. The barrier to action most often cited by land trust practitioners in the case studies was the likelihood of landowner resistance. A landowner may, in fact, *prefer* a little vagueness in the easement language, on the theory that it provides some wiggle room in interpreting the restrictions. Understanding her needs and dreams for the future of her land can help you decide how and when to approach her with a proposal. You will need:

**Patience.** Problem easements won't usually get resolved overnight. As a first step, identify possible solutions. Next, determine when to propose a solution to the landowner. Be on the lookout for opportunities to open the conversation, such as a request for clarification or a change in ownership.

**Consistency and resolve.** If you know there is inconsistent or vague language in the easement, decide in advance how you will interpret it and be consistent in communications with the landowner. This does not mean the land trust needs to alienate a landowner through threats. A note in the stewardship file might say this: "Remind the landowner during each visit that the land trust takes the position that, notwithstanding the view preservation recital, the prohibition on tree-cutting takes priority."

**Flexibility and creativity.** A good negotiator knows how to listen and identify what the other side really wants. Understanding the landowner's motivation may lead to a creative solution. The land trust should be

## Finding Solutions

As a partner in the Easement Revitalization Initiative, New Jersey Conservation Foundation allowed Solid Ground's national conservation team to rummage through the details of several problem easements in order to better understand the issues and possible solutions. Executive Director Michele Byers readily admits that the process can be overwhelming, but it's also clarifying: "After going through the easement revitalization process, we realized that extinguishment is off the table. Even if it looks like common sense, it would have such a large negative impact to the state." The bottom line, she says, is that she's "relieved that we were not alone in not having answers to everything about our problem easements, and that we could be creative with solutions."

willing to consider all ideas, but should also be clear about the limits to its flexibility.

### Getting the help you need

Of course, optimism and a toolkit will not necessarily solve a problem easement. There is one more key ingredient: a land trust needs the ability to call in the right team for the problem. In many cases, this will require bringing in an attorney with a strong property law background who also understands conservation easements and the legal constraints imposed by state and federal laws regarding charities. In other cases, it could be a surveyor or land planning consultant. Finally, in some cases, the best person for the team will be a smart individual known and trusted by both the land trust and the landowner who can help negotiate and facilitate a conversation.

### Easement Revitalization: an ongoing process

Picture the stewardship director 20 years from now, looking at the easement your land trust proudly signed *just last week*. Are you confident it will have stood the test of time? In light of what we know now 30 years after the land trust movement emerged, do you really believe you can foresee everything that should go into an easement?

It seems the right approach is for us to acknowledge the perpetuity of easements, but also begin to understand that they require maintenance over time, just like the most expertly made car, plane or building. This is easement revitalization. 🌱

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