New Hampshire Town And City

The Roles and Responsibilities of Municipalities in Monitoring and Enforcing Conservation Easements

New Hampshire Town and City, September/October 2015

By Thomas J. Donovan and Terry M. Knowls

The natural beauty of New Hampshire, exemplified by its pristine water sources, mountain views, forests, and farmlands, attracts large numbers of seasonal visitors as well as those seeking permanent residence in the state. Because unique natural features are often equated with prime development sites, a system for the preservation of these special places for future generations, through conservation easements, was enacted by the New Hampshire legislature in 1973.

What is an easement? In general, a conservation easement is a permanent prohibition on certain activities, often commercial or residential development, on a parcel of land. See NHRSA 477:45 I Conservation and Preservation Restrictions, Definitions.

The grantor of an easement permanently extinguishes certain rights in the use of the property. Typically, a conservation easement prohibits any activity that would diminish or harm the special features and/or unique characteristics of the land being protected. These use restrictions are specified in the easement deed, run with the land in perpetuity, and are legally enforceable against all future landowners by the easement holder.

An easement holder may be a municipality, or a qualified conservation organization, with the legal duty to monitor and enforce any and all restrictions on the use of the conserved land as specified in the conservation easement deed. There may also be an executory or “back-up” easement holder who insures the primary easement holder is carrying out its responsibility to enforce the terms of the easement.

If a New Hampshire municipality has accepted, or is considering the acceptance of, conservation easements it is important for town and city officials to understand their roles and responsibilities in monitoring the use of the conserved land and in insuring the provisions of the easement are fulfilled and enforced. See NHRSA 477:46 Restrictions Enforceable.

If a municipality decides to accept an easement, as part of its due diligence there are important questions to be asked before the deed is executed. Has the property in question been identified in the master plan as a priority protection area (e.g. prime agricultural soil, aquifers, open space, wildlife corridors, historic site) for the community? Does the owner of the land have clear title to the property? Is there an up-to-date-survey? Is the property free of hazardous waste and/or other contaminants? Does the town/city have the resources and expertise to monitor the property? Will the municipality require payment into a restricted fund to cover the costs associated with its monitoring activities?

Once an agreement is reached between the parties, the next step is to establish a baseline description of the property. Baseline documentation may include, but not be limited to, the identification of any monuments delineating the boundaries of the lot or parcel, a detailed description of the present use of the property, photographs, and identification of any buildings, wells, septic systems, burial grounds, unique natural features, etc. Comprehensive baseline documentation can be useful in monitoring the property or addressing questions involving an alleged violation arises at some point in the future.

It is recommended the proposed easement deed be reviewed by the city solicitor or the town counsel prior to its execution. The language in the deed should be clear and unambiguous and, to the extent possible, the meaning of specific words describing reserved rights, use limitations, and/or permitted activities should be easily understood. For example, while the word “agritourism” is defined in RSA 21:34-a, a recent disagreement over the interpretation of that term necessitated a ruling from the New Hampshire Supreme Court in a local zoning case. Forster v. Town of Henniker, NH Supreme Court No. 2013–893, decided June 12, 2015.

Once acquired, the municipality, as the easement holder, has a duty to monitor activities on or changes to the conserved property, generally once a year, to insure compliance with the terms of the easement deed. All inspections should be conducted in a thorough and consistent manner. The municipality may also find it useful to create a formal process for receiving, reviewing, and following up on citizen complaints about any alleged misuse of conservation land.

A conservation easement is only as good as its enforcement. Therefore, if ongoing monitoring activities, or a citizen complaint, uncovers a possible violation, it must be forwarded to the appropriate body, generally the governing board of the municipality and/or the conservation commission, for investigation. If it is ultimately determined a violation has occurred, the next step is to notify the landowner of the activity which constitutes a breach of the terms of the easement. If another person has caused the violation, such as a neighboring land owner, that person should also receive notice.

If a landowner refuses to remedy the violation and/or disputes that a breach has occurred, the municipality must then make a decision on how to proceed. Some easement violations are more serious than others. For instance, prohibited ATV use, trash dumping, or minimal timber cutting may have a minor or temporary adverse effect on the conservation values protected by the easement. In that case, a warning letter followed by increased monitoring may be sufficient. On the other hand, the violation may be of a more serious and permanent nature such as the construction of roads, erection of structures, or clear cutting of timber. In that case, the municipality must be prepared to bring an enforcement action in court against the landowner.

Litigation in these situations can be unpleasant, complex, and expensive depending upon the nature and extent of the violation. If the violation continues or escalates, the municipality may need to go to court to obtain a preliminary injunction. A preliminary injunction will order the violating party to cease the activity immediately while the case proceeds to a final hearing. Later, at the trial on the merits, the municipality may seek a variety of remedies including but not limited to permanent injunction orders against further violations, and an order for remedial action. For instance, the court may order the violator not to place any further trash or structures or roads on the property, and to also remove trash or structures or roads placed in violation of the easement. Finally, the municipality may request monetary damages to compensate for its costs in mitigating the effects on the property from the easement violation.

Experience has shown that conservation easements do not necessarily remain unchanged over time and future circumstances can be hard to predict. Adjacent forest land may become developed, a homeowner may hope to place solar panels on easement land, or a farmer may decide to change the agricultural use of a pasture. In such cases, the underlying land owner may seek to amend the conservation easement to permit a different use of a portion of the property or to change the portion of the property subject to restrictions. Consideration of these requests can take a great deal of time, and they must be handled carefully.

The easement may contain language giving the municipality discretion to agree to amendments that are consistent with or which further the purpose of the easement. For example, a homeowner who wants to place solar panels on one acre of a sunny slope subject to an

easement may be willing to place new restrictions on two acres of previously unrestricted land. If the change is minor, the municipality may agree in principal to amend the easement but must take into consideration a number of factors before granting the request.

It is important to note the conservation easement amendment process may place the municipality in contact with the Attorney General. Why? Because most conservation easements are donated in whole or in part as a charitable gift to the easement holder. That transaction creates a charitable trust, since the easement is donated for a charitable purpose, i.e. the protection of certain land for conservation purposes. The municipality acts as a "trustee" to protect the property's conservation values and the Attorney General, representing the public interest, oversees charitable trusts. Because a proposed amendment to a conservation easement may affect certain conservation values, the Attorney General, Charitable Trusts Unit may need to become involved in the process.

A municipality asked to consider an amendment to a conservation easement should carefully review the publication Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements, available through the Attorney General's website (see below). It sets forth seven principles for New Hampshire easement holders to consider in reviewing such requests. The publication divides requests into low, medium and high risk amendments. It explains which amendments require the Attorney General's review and which amendments require court approval.

Given that most conservation easements are charitable trusts, municipalities must take their roles seriously. A town or city's biggest risk lies in not monitoring or enforcing the easements they hold, or in granting easement amendments too readily.

The Charitable Trusts Unit stands ready to assist municipalities facing amendment requests or alleged violations of conservation easements.

By carefully reviewing proposed conservation easements, and prudently monitoring and enforcing existing easements, municipalities can measurably improve the health, environmental quality, agricultural, recreational and aesthetic values within their communities.

Thomas Donovan is the Director of Charitable Trusts and Terry Knowles is the Assistant Director in the New Hampshire Department of Justice in the Office of the Attorney General. The publication Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements may be found at: http://www.doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf.