Co-Holding Conservation Easements

Considerations for Good Management and Conservation Outcomes

A conservation easement may be granted to multiple entities. These holders of the easement are then each responsible for upholding the easement's conservation objectives. The respective roles of the holders and their relationship to one another must be carefully delineated to achieve effective easement management and minimize potential conflict.

Introduction

The Holder

By its nature, every conservation easement needs an easement holder, which may be a land trust or a unit of government. The holder—in accepting the grant of an easement—takes on both rights and obligations in regard to the management[1] of the conservation easement in support of the easement's conservation objectives.

Co-Holding Versus Holder and Beneficiary Approach

Occasionally, a funder (typically a local government) or other conservation partner connected to an easement transaction may insist on being named as an additional holder. This practice should generally be avoided. Having multiple holders for a single easement risks confusion or even conflict in the management of the easement, in addition to the extra costs of redundant management.

Not everyone seeking to conserve a property needs to be an easement holder to assure that their interests, and the conservation objectives of the easement, will be met. The interests of a funder or other crucial conservation partner often may be protected by making them an easement beneficiary. This approach to providing the party with rights regarding the easement can be simpler to manage, more cost-effective, and less prone to misunderstandings. This approach is explored in the WeConservePA guide *Beneficiaries and Backup Holders*.

Multiple Holder Arrangements

If, nonetheless, there is a compelling reason to grant the easement to more than one holder, the holders need to carefully consider and arrange how they will interact with one another to fulfill their easement management responsibilities. This guide describes the issues that arise when a conservation easement is to have multiple easement holders and the steps necessary to minimize tension and conflict between the holders and in the management of the easement.

Note that this guide avoids the term "co-holders" to describe multiple holders because the term may lead some to assume (mistakenly) that there is a particular express or implied relationship among the holders. Absent an agreement by the holders, this is not true.

Easement Holder

Before analyzing the effect of having multiple holders of a conservation easement, it's helpful to contextualize the holder's role.

Easement Holder's Relationship to the Land

Real Property Interest

The grantee of a conservation easement is called a holder for good reason. The grant of conservation easement conveys a real property interest in the eased land to see that the land's conservation values are maintained. The holder of this interest holds the power to block uses of the eased land inconsistent with the conservation objectives of the easement. The conservation easement is a vested interest, meaning it is immediate, permanent, and not contingent on any future events. It exists as a powerful interest of the holder from the moment the grant of easement is signed and delivered.

Easement Management Responsibilities

Simply holding the power to block land uses inconsistent with conservation purposes is not enough; the conservation easement must be managed on an ongoing basis to maintain its viability and effectiveness. Easement management responsibilities typically include the duty to monitor the eased property; to keep permanent records of changes in the eased property from baseline documentation; to respond to landowner requests to determine whether a proposed activity is inconsistent with the grant or to interpret the grant covenants as applied to changed circumstances; to review landowner plans and make recommendations to further the conservation purposes of the easement; to consider whether changes to grant covenants further the conservation purposes of the easement; and, when a land use occurs or is threatened that is inconsistent with the conservation purposes of the conservation easement, to wield the power to block it.

Easement Holder's Relationship with Landowners

From the moment a grant of conservation easement is signed, the easement holder enters into a relationship not only with the landowners granting the easement but with all of their successor owners extending indefinitely through time. The covenants within the grant are the foundation for the holder-landowner relationship as discussed below.

Harmonizing Concurrent Interests

Land ownership is sometimes described as a bundle of sticks because it can be divided into many different interests running concurrently in the same land. One stick might be the right to build a house; another stick—the right to take timber; another—the right of access via an easement; still another—the right to possession via a lease.

Whenever land ownership is broken apart into concurrent interests in the same land, the holders of these interests typically enter some form of agreement to sort out potential sources of conflict and misunderstandings. For example, leases typically explain what changes may or may not be made to the leased premises. Documenting this understanding protects both landlord and tenant by setting clear limits on each of their interests.

The covenants in a grant of conservation easement serve a similar purpose. Clarity as to the sorts of changes to the eased property that are, or are not, consistent with the conservation objectives of the easement protects both landowners and easement holder. The clarity delivered by the covenants promotes harmony and eliminates sources of discord based upon mistaken assumptions.

Participating in Land Use Decisions

The covenants establish a framework for mutual participation by landowners and the holder in key decisions affecting natural and scenic resources within the property. The rights of review and approval granted to the holder over certain proposed changes open the door to a dialogue between holder and landowners as to whether a change would be consistent with or contrary to the conservation

objectives. The covenant relationship with the easement holder affords landowners the opportunity to call on the holder to interpret the terms of the grant in light of new circumstances and, in some cases, to provide other assistance pertaining to resource management issues. The role of holder involves thoughtful deliberation, sound judgment, and the establishment of consistent practices. Landowner, holder, and conservation objectives all benefit when there is clarity around the role and authority of the holder.

Multiple Holders

If the demands of project funders or other considerations necessitate having multiple holders, the potential for management problems may be reduced if the holders carefully and explicitly set forth their expectations and define their relationship.

Lack of Agreement Leads to Trouble

Holders may perform with relatively few problems the basic easement administration tasks of monitoring and recordkeeping independently without an agreement with one another. However, the potential for problems escalates when moving beyond routine matters.

> *Example:* A conservation easement is granted to Holder A and Holder B. They each perform their own monitoring and recordkeeping. The landowner submits a proposal to each for an improvement permitted under the grant subject to holder review and approval. Holder A notifies landowner of its finding that the improvement is consistent with the easement's conservation objectives and, thus, is approved. Holder B notifies the landowner of its disapproval. Each submits a separate bill to the landowner for the costs of review.

Holder A may be exercising its review responsibilities in good faith but to no avail because, as a practical matter, Holder B has a veto power over Holder A's decision; likewise, the reverse. The landowner is, understandably, confused and dismayed to find that the easement holders have no obligation to (at the very least) discuss their concerns with each other.

Holder Agreement

For purposes of this guide, the term "Holder Agreement" means a written document evidencing a meeting of the minds among multiple holders as to how easement management responsibilities will be handled. The content of a Holder Agreement will vary depending upon the relationship of the holders.

Standards and Practices

Standard 8, Practice E.1. of Land Trust Standards and Practices calls on land trusts to:

> When engaging in a partnership on a joint acquisition or long-term stewardship project or when co-holding conservation easements, create written agreements to clarify:
>
> a. The goals of the project
>
> b. The roles and responsibilities of each party
>
> c. Legal and financial arrangements
>
> d. Communications to the public and between parties.

Separate Agreement Versus in the Grant

Holders *may* use the grant of conservation easement to document their arrangements but should avoid doing so for the following reasons:

- Any terms of the Holder Agreement included in the grant become part of the grant. The landowners, as parties to the grant, have rights to enforce those terms and veto changes in them unless otherwise agreed. There is no guarantee that future landowners will be cooperative, and, over time, it is reasonable to expect that adjustments to the Holder Agreement will become desirable.
- The arrangements between the holders as of the easement date will likely change over time. Periodic

review and updating of the Holder Agreement to reflect these changes is highly recommended. A Holder Agreement separate from the grant facilitates this updating process and avoids the potential difficulties of formally amending the grant.

Public Notice of Terms

The Holder Agreement is a contract between the holders. Unless there is a specific reason to give future landowners or other persons notice of one or more of its provisions, there is no need to record.

The discussion below of issues to be addressed in different types of Holder Agreements notes, as to specific issues, the reasons why recorded notice of those provisions may be appropriate.

Issues to Be Addressed by Holder Agreement

Multiple easement holders must work together on certain key decisions for the easement to be managed in a reasonable and efficient manner. A Holder Agreement may be used to set a protocol to be followed when critical decisions need to be made. Some of the issues that may be addressed in a Holder Agreement between independent holders are as follows:

- What events are subject to the protocol set out in the agreement? Some possibilities are requests by the landowner for review and approval; requests for interpretation of grant provisions; request for change in the terms of the grant document; commencement of an enforcement action.[2]
- What is a reasonable period of time for each holder to review and communicate its views to the others, and what happens if one holder fails to communicate at all?
- If the holders disagree with one another, is there an obligation to meet and/or discuss points of difference so as to find, if possible, a mutually acceptable common ground?
- What happens if there is still no concurrence? How will communications with landowners be handled?
- If the grant is intended to be a qualified conservation contribution for federal tax purposes:
  - Will the holders issue separate contemporaneous written acknowledgments of the gift or issue one signed by each? [3]
  - Will they each sign IRS Form 8283? Prudence dictates that both should sign to avoid jeopardizing deductibility. [4]
  - Who is entitled to proceeds of condemnation and in what proportions?[5]
- Do the relationship structure and Holder Agreement satisfy the requirements for coverage by Terrafirma Risk Retention Group for conservation defense?[6]
- If funding for stewardship has not been arranged independent of the agreement, what will be the arrangements?

Options for Structuring Holders' Relationship

Multiple easement holders may arrange a relationship between themselves in a number of ways. When two holders put a particular framework around their relationship (or don't define the relationship at all), common law may fill in the gaps. A failure to understand the legal nature of the relationship can lead to unexpected results. This guide discusses three basic categories of legal relationships:

- **Independent Easement Holders:** Each easement holder exercises its rights and duties under the grant independently.
- **Principal and Agent Easement Holders:** One holder depends upon the other to fulfill easement management responsibilities.

- **Partnering Easement Holders:** The easement holders agree to exercise their rights and powers together, not separately.

The structure of any relationship between multiple holders is highly customizable. The arrangements among easement holders need not fall entirely into one category or the other for all easement administration tasks. For example:

- Independent easement holders may have an understanding that one holder will act as agent for the other if an easement enforcement action is required.
- Partnering easement holders may agree that Holder A will be the agent of Holder B with respect to monitoring activities, but enforcement decisions will be made cooperatively.

The following sections further explain the features of the three basic categories of legal relationships in regard to multiple easement holders.

Independent Easement Holders

The status of independent easement holders is the default if the easement holders do not form any other relationship. Absent any additional understandings or agreements, a landowner with multiple easement holders must regard each holder independently of the other. This follows the general legal principle that absent an agreement otherwise, multiple owners or holders of an interest in real estate have no implied duty to cooperate with each other, share any responsibilities, or communicate with one another.[7]

Multiple holders might select this form of relationship intentionally where both holders intend to be actively involved in the day-to-day stewardship but prefer to work independently. If this approach is desired, independent easement holders should still enter a holder agreement that addresses all foreseeable issues discussed above in the "Issues to be Addressed by Holder Agreement" section of this guide.

Principal-Agent Easement Holders

Consider a scenario where a municipality insists upon being listed as a holder, along with the partner land trust, despite lacking interest in providing regular monitoring of the easement or being troubled with other responsibilities. What happens if the land trust, on the basis of a tacit or explicit understanding with the municipality, performs the holder role on behalf of both? (As previously discussed, parties contemplating a "one holder acting for both" scenario should strongly consider a holder/beneficiary arrangement instead, as addressed in the guide *Beneficiaries and Backup Holders*.)

In general, a principal-agent relationship arises when one party (the "principal") authorizes another party (the "agent") to act on its behalf and subject to its control, whether such authorization is explicit or implied. When one holder has actual or apparent authority to act on behalf of the other, risks and responsibilities may attach to the relationship by operation of common law. For example, a principal may become liable for actions of the agent, and the agent may have a fiduciary duty to make decisions in the best interests of the principal. Both the managing holder (acting as agent), and the non-managing holder (acting as principal) take on responsibilities and risks they may not have bargained for.

No Long-Term Commitment

The principal-agent relationship lasts only for so long as neither holder terminates it. Both holders remain individually responsible for their duties under the grant, and the relationship reverts to independent holder status if and when the agency relationship is terminated. A principal and agent may agree to a minimum term or a notice period before termination is effective but, in general, both holders are free to go their separate ways.

Implied Agency

As mentioned above, it is possible to create a principal-agent relationship by implication, without realizing or intending it.[8]

Example: The township is legally bound by ordinance to be holder of any easement it acquires with municipal funds; however, the township does not have the staff or the expertise to provide easement management services on a regular basis. The township sees that it can avoid the burden of management yet still achieve conservation by relying on a second holder, the land trust. Over the ensuing years, the township relies upon the land trust to perform all easement management; the land trust has assumed the role of easement manager; and the landowners have come to rely upon the land trust in that capacity.

The land trust is managing the easement on behalf of itself as well as the township; thus, whether or not they enter into a formal agreement, a court is likely to resolve issues pertaining to their easement management responsibilities by applying the legal rules governing a principal-agent relationship.

Agent's Authority to Bind Principal

Under the legal rules applicable to agency, the agent is authorized to act on behalf of its principal. This rule protects those who reasonably rely upon an agent's apparent authority. In the above example, the landowners have become accustomed to dealing solely with the land trust on easement management issues; thus, it may be reasonable for them to rely upon the land trust's apparent authority for all easement management issues. If the landowner takes action in reliance on an interpretation of the easement provided by the land trust, and the township later objects, a court is likely to invoke the law of agency to protect the landowner. If the township expects to retain its right to approve certain critical management decisions, it needs to make that clear to the land trust and landowners.

Principal is Liable for Actions of Agent

One of the pitfalls (and purposes) of the law of agency is that, as a legal matter, responsibility always remains with the principal—it never shifts to the agent. One cannot relieve themselves of responsibility by directing someone else (explicitly or implicitly) to act in their stead. Thus, in the above example, regardless of the relative knowledge and experience of each, the township is viewed as responsible for the acts of its agent, the land trust, including the negligent or wrongful acts of its employees acting in the course of the agency. An indemnity provision in a Holder Agreement, and adequate liability insurance coverage, will help to mitigate these consequences. But the easement holder who allows an agency relationship to be formed by course of conduct may not realize that it is at risk for the acts and omissions of employees of the other holder.

Conflicting Duties

An unintended principal/agent relationship involves substantial risk for the agent as well. The agent has a duty of loyalty to its principal, which means that the agent must act in the best interests of the principal rather than its own interest. As applied to the above example, this is not a problem so long as both township and land trust are in accord on easement management decisions. But, if not, the land trust will find itself in a predicament:

Example: Same facts as above but, upon reporting a potential easement violation to the township, the township demands that the land trust commence immediate legal action because it is in the township's best interests to avoid the public perception that easements are not strictly enforced. Upon further investigation, the land trust concludes that there is no immediate danger to natural or scenic resources and that the land trust's mission is furthered by working with the landowners to implement a mitigation plan that will not only restore but enhance resource values of the eased property.

Without a clear agreement between the land trust and the township, the land trust faces an impossible decision. As agent for the township, it cannot decline to follow the township's directions without breaching its duty of loyalty. On the other hand, if the land trust follows the township's directions, even though not considered a prudent course of action by the land trust board, then the land trust violates its duty to act in the best interests of its

own organization. Thus, any Holder Agreement for principal-agent holders that sets a mandatory term of commitment must also make it clear that if conflict occurs (and is not timely resolved), the manager holder has the right to withdraw from the relationship and act only in its own best interests.

Issues to Be Addressed by the Holder Agreement

The above discussion suggests that if multiple holders desire an arrangement that resembles a principal-agent relationship, a Holder Agreement tailored to address key matters is strongly advisable. It is also advisable to formalize and clarify a relationship that has already developed informally. Key issues pertinent to the principal-agent relationship include the following:

- What are the limits of the manager holder's authority to act on behalf of the non-manager holder? Alternatively, what critical decisions must be referred to the non-manager holder for its separate approval?[9] If an explanation is not included in the grant, whose duty is it to inform the landowners of the limitations on manager holder's authority to bind both holders?
- Are there any conditions or limits on the ability of either holder to terminate the arrangement? Is there any protocol to follow before severing the relationship? For example, a discussion period, possibly with the assistance of a mediator.
- What compensation is to be paid for easement management services? What is the understanding regarding reimbursement of costs and expenses incurred in the course of easement management?
- What is the stewardship funding arrangement? Who owns the stewardship fund or endowment, if any, associated with the easement? If the stewardship fund is in the custody of the manager holder (but not wholly owned by that easement holder) is the manager holder authorized to withdraw funds to reimburse itself for management costs and expenses? Are there any limits on withdrawal from principal as well as earnings? Any limits on amount or type of expenses?
- If litigation or other costs and expenses outside ordinary easement management arise, what arrangements apply to funding those costs? Is the manager holder required to fund and seek reimbursement after? Or is there a mechanism for funding an agreed-upon budget for extraordinary easement management costs and expenses?
- What is the manager holder's responsibility to protect the non-managing holder from claims arising out of negligent acts or omissions of its employees and other representatives in the course of easement management activities?

Partnering Easement Holders

Easement holders may form a partnering relationship for a single project (similar to a joint venture in a business context) or for a series of projects (similar to a partnership in a business context). The essence of a partnering relationship is that it is a long-term commitment to manage one or more easements together, not separately.

Partnering Advantages

Partnering, like all multiple holder situations, adds a layer of complexity to conservation management. There may, however, be reasons for two organizations to choose this relationship. For example, two organizations have complementary skills or resources and believe they can accomplish more together than separately. Land trusts considering this relationship should balance the possible benefits with the transaction costs of structuring the relationship and administering it consistently over time.

Options to Formalize Association

At its simplest, a partnering arrangement can be a written agreement that lays out the core understandings about how the holders will allocate responsibilities and costs.[10]

If there's a compelling reason to do so, the partnering holders may elect to form a separate legal entity.[11]

Due Authorization

Without a Holder Agreement that carefully defines the relationship between two holders, there exists no hard line between a partnering arrangement and a principal-agent relationship. By actions alone, the holders may oscillate between them over time. If a partnership arrangement is desired, it should be stated in a Holder Agreement that identifies the key decisions that require the consent of both easement holders to be effective. Landowners need to know this as well; otherwise, just as in the case of a principal-agent relationship, either holder may appear to have the authority to bind the association and landowners will be protected if they rely on that authority and their reliance is reasonable under the circumstances.[12]

Unwinding

Easement holders considering a partnering arrangement must be candid with one another about their expectations and how they will unwind their association if those expectations are not met. Most likely at some point, one easement holder will no longer be willing or able to bear its share of the burdens of easement management. Addressing that eventuality upfront will assure both that there is a fair and orderly path to handle it when it occurs.

Issues to Be Addressed by Holder Agreement

The issues arising in a partnering arrangement in a conservation context are much the same as in a business context.

- Do the easement holders intend to formalize their relationship with a separate name and/or separate tax identification?
- Is the partnering arrangement for a single easement or do the holders anticipate that they will pursue other opportunities together? If the latter, how will they differentiate opportunities that ought to be pursued together from opportunities that each can pursue separately?
- What expectations do they have about the investment in time and resources each will make in the project?
- What actions may be taken by either holder on behalf of both and which need approval by both holders?
- What happens if one holder does not meet expectations or is not satisfying its obligations?
- What happens if their actual investments, relative to each other, are not as anticipated?[13]
- In the event of a dispute, is there a mechanism to seek a resolution before unwinding the association? Perhaps a good-faith negotiation period facilitated by a mediator? What will be the result if the association is unwound?
- What happens if one wants to transfer its interest as easement holder?
- How is stewardship funding to be held and invested? How are earnings on the fund allocated? Under what circumstances may the principal be disbursed? What happens if stewardship funding becomes inadequate?
- How will each partnering holder be assured that the other will not take inappropriate credit for the project; or use project contacts or information to the detriment of the other; or otherwise take unfair advantage of this opportunity?

Conclusion

The goals of conservation are served by clearly defined roles and relationships between the parties to an easement transaction. Including multiple holders adds complexity and is a practice to be generally avoided. If that isn't possible, a carefully prepared holder agreement is recommended to define the relationship in a way that improves clarity, reduces risks, and lowers the potential for conflict.

WeConservePA produced this guide with support from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.

This guide was prepared by Justin Hollinger, Esq., with contributions from Andrew M. Loza. The guide draws much of its content from the out-of-print 2013 WeConservePA guide *Holders, Beneficiaries, and Backup Grantees*, authored by Patricia L. Pregmon, Esq., and Loza.

v. 1/25/2024

[1] Easement management includes educating landowners regarding the conservation objectives of the easement, monitoring the land, reviewing proposed activities that may impact the land's conservation values, interpreting the terms of the grant of easement, enforcing the terms of the grant, and otherwise supporting the conservation objectives.

[2] If the landowner granting the conservation easement is concerned that a particular protocol will be observed and wants assurance that the Holder Agreement will not change on that point, the protocol may, if acceptable to holders, be included in the grant. An alternative is to provide in the Holder Agreement that the landowners granting the easement have a right of prior approval over changes to the protocol for so long as they own the eased property.

[3] It would be unwise for a holder in a multiple holder arrangement not to issue or co-sign a contemporaneous written acknowledgement in the absence of IRS guidance stating or court rulings finding otherwise. The acknowledgement serves to establish for tax purposes whether goods or services were exchanged as part of the donation. Clearly, goods and services may be exchanged between the donor and one holder but not another.

[4] Karin Gross, Supervisory Attorney with the Internal Revenue Service, stated in a private conversation on July 12, 2013, that all holders should sign. The logic was presented that with Form 8283 a holder affirms that it will report any transfer of the property interest with Form 8282. Since one holder could transfer their interest in the conservation easement to another party independent of another holder, each holder's signature on Form 8283 is relevant. Conversation reported by Andrew M. Loza, executive director of Pennsylvania Land Trust Association (now known as WeConservePA).

[5] Holders may elect to include within the grant their agreement as to distribution of condemnation proceeds. The rationale is to put the condemning authority on notice as to the proper distribution of proceeds.

[6] See *Coverage*, https://terrafirma.org/info/coverage (last visited Jan. 25, 2024) (providing an overview of "co-holder coverage" requirements and policy).

[7] Generally, co-owners of a real property interest are not fiduciaries with respect to each other. Each co-owner is expected to look after his or her own interest. Dukeminier Krier, *Property,* 3rd ed., 356. With respect to easement management responsibilities, there may be a duty to contribute to the reasonable cost of easement management activities furnished by other holders. The analogy is to the duty to contribute to the reasonable cost of maintenance of a servitude used in common (for example, an access easement). Restatement 3rd of Servitudes §4.13.

[8] "Evidence of a course of dealing between parties to a transaction is competent to show their intention and the fact that a person has acted as an agent for another in previous transactions is evidence tending to prove agency in a similar transaction." Dobbs v. Zink, 290 Pa. 243, 138 A. 758 (Pa. 1927) (internal citations omitted).

[9] For assurance that all present and future landowners are aware of the issues requiring prior written approval of both holders independently, the grant may include this information for notice purposes.

[10] WeConservePA hopes to identify and post examples (exemplary if available) of co-holding agreements under the topic Conservation Easement Co-Holders & Beneficiaries at the WeConservePA Library: https://library.weconservepa.org/library_items/topic/265

[11] Formation of a separate legal entity can be achieved in a number of ways: as a membership nonprofit corporation with the partnering organizations as members, an LLC with the partnering organizations as

members, as a partnership with the partnering organizations as partners, or by organizing as an unincorporated nonprofit association. Doing so may involve a substantial amount of planning, corporate formalities, tax issues, and ongoing administration. Any plan to do so should be supported by a compelling reason and carefully reviewed with legal counsel.

[12] Apparent authority is the "power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from, and in accordance with, the other's manifestations to such third persons." Restatement (Second) of Agency.

[13] For example, Holder A may understand that it has to invest $1,000 in management efforts each year and expects Holder B to do the same. If it turns out that Holder B only needs to spend $500 doing its share, does that change the balance in the relationship? Maybe yes, maybe no, but it's an issue that partners need to discuss.