

Beneficiaries and Backup Holders

Providing Third Parties with Rights but Not Responsibilities Regarding Conservation Easements



A grant of conservation easement may provide one or more rights to a party other than the landowner and holder of the easement, in accordance with the needs and wishes of those involved with the easement transaction. Unlike for the easement holder, such rights received by the “beneficiary” do not come with obligations.

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Introduction

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 regarding the conservation easement in support of the easement’s conservation objectives. Other parties (such as a local government helping to fund the establishment of the easement) may also have interest in seeing the conservation objectives of the easement upheld. This guide explores a range of options for structuring rights and roles for parties other than the holder under a grant of conservation easement.

As discussed in the WeConservePA guide *Co-Holding Conservation Easements*, naming multiple easement

holders should generally be avoided, as doing so tends to create risks that are difficult to manage.

Easement Beneficiary

The owners granting a conservation easement and the easement holder may agree to name an easement beneficiary, providing the named entity with some rights to manage the easement in furtherance of the conservation objectives but no responsibility to do so. “Beneficiary” is the term used in the WeConservePA *Model Grant of Conservation Easement and Declaration of Covenants* to describe entities (other than the holder and landowners) that are accorded one or more rights under the grant. Unlike holders, easement beneficiaries are not burdened with easement management obligations. Making an entity an easement beneficiary is often a practical alternative to having multiple holders. The easement beneficiary, though not a signatory to the grant, has a protected interest in the conservation easement.

Rights of an Easement Beneficiary

One cannot infer that any particular rights come with being named a “beneficiary” of a conservation easement. No right is intrinsic to the term. The rights a beneficiary is to have must be spelled out in the grant of easement. Those rights might include but are not limited to:

- The beneficiary may exercise the holder’s rights and duties under the grant if the holder fails to uphold the conservation easement.

- The holder must consult with the beneficiary prior to the holder approving or disapproving a request of the landowners regarding an action subject to the holder's review.
- The beneficiary's approval is required for any amendment of the grant of easement's terms.
- The beneficiary's approval is required for any transfer of the holder's rights under the grant.
- The beneficiary may petition a court to transfer the easement to a successor if the holder fails to perform its responsibilities.

The rights may be written to apply to all the land subject to the easement or just a portion if that portion is all that is of interest to the easement beneficiary. For example, a local municipality may financially support the placement of an easement on woods adjacent to the local park and thus want to have some beneficiary rights regarding those woods but may be utterly indifferent to the contiguous farmland to be conserved with the same easement.

Benefits of Holder and Beneficiary Arrangements as Contrasted with Multiple Holders

An easement holder and beneficiary arrangement provides distinct advantages over a multiple holder arrangement:

Rights Not Responsibilities

Unlike easement holders, easement beneficiaries are not responsible for long-term easement management. They are not even responsible for overseeing the holder's long-term easement management.

Lowered Risk

Easement beneficiaries are not responsible for the negligent or wrongful acts or omissions of holders, and holders are not responsible for the passivity, failure, or negligent actions of beneficiaries.

Focus on Relevant Management Concerns

When the grant is being prepared, easement beneficiaries may select those key management decisions that they want to be involved in and leave the rest to the easement holder.

Focus on Relevant Conservation Concerns

Funders of different aspects of a conservation project can be given rights particular to their project interest. The funder of wildlife habitat protection on one part of the property and the funder of farmland preservation on another part can each be recognized as having rights of approval specific to the issues pertaining to their respective project investment but not outside their area of investment.

Improved Clarity

Where an easement has multiple holders, misunderstandings can emerge about the apparent or actual authority of one holder to make decisions without the concurrence of the others. By using a single holder and assigning only specific rights of approval to beneficiaries, decisional authority is clear and confusion is unlikely.

Avoidance of Multiple Holder Pitfalls

The complexities and pitfalls (some introduced above) involved with multiple holder arrangements, as described in the guide *Co-Holding Conservation Easements*, can be avoided.

Holder – Beneficiary Agreement

While the rights of a beneficiary can and should be specified in a grant of conservation easement, a separate agreement between holder and beneficiary is advisable. For example, without specific agreement, an easement beneficiary granted rights to enforce (in the event of holder failing to uphold the conservation objectives) could take precipitous action without consulting with the easement holder. The holder will reasonably want to establish a protocol with the easement beneficiary that affords an opportunity for the holder to discuss concerns with the easement beneficiary and perhaps agree upon a

mutually satisfactory course of action. The agreement might cover:

- What notices or reports must be furnished to the easement beneficiary?
- What notice is an easement beneficiary required to give the easement holder before acting on its own?
- What arrangements apply to review and approval of owner requests? The easement holder to review first and communicate its finding to easement beneficiary? What is a reasonable period of time for the easement beneficiary to furnish its approval or rejection?
- If there is no concurrence in the first instance, is there an obligation to meet or discuss points of difference so as to find, if possible, a mutually acceptable common ground?

Beneficiaries in Model Grant of Easement

The supplemental provisions in the commentary to the [*Model Grant of Conservation Easement and Declaration of Covenants*](#) published by WeConservePA include provisions for identifying easement beneficiaries and their respective rights.

Backup Holder

The landowners and holder may agree to graft onto the grant of conservation easement a contingency plan to replace the holder with another entity if at a later date the holder cannot or will not perform its duties in regard to easement. They identify in the grant a “backup holder,” a public entity or land trust recognized by the parties as being an appropriate replacement if the easement holder is no longer performing its easement management responsibilities. (“Backup grantee” is a common alternative term for backup holder.)

Several Strategies Available

Several strategies are available for such a contingency plan:

- Provide an automatic shift to the backup holder in the event the easement holder fails in its duties;
- Make a recommendation to the court as to a suitable substitute holder if a court finds itself giving an order for a transfer; or
- Provide for a court-supervised process to effect a transfer to the backup holder.

Automatic Shift to Backup Holder?

A grant of conservation easement may be written to provide an automatic shift of ownership of the easement if the easement holder fails in its duties. The technical legal term for this is a shifting executory interest. For the shift to happen automatically, the granting clause of the easement must convey *both* the present (but limited) interest to the easement holder and the future (executory) interest to the backup holder as in the following example:

By this Grant, the undersigned Owner or Owners grant and convey to Holder an unconditional and perpetual easement upon the Property for the purpose of advancing the Conservation Objectives described below (that easement, the “Conservation Easement”) but if Holder ceases to exist or fails to uphold the Conservation Objectives, then to [name of backup holder].

[Caution: for this example to work with the [*Model Grant*](#), one would have to adjust the model’s definition of Holder. Legal counsel should be consulted regarding this and other potential issues with this approach.]

Pros and Cons

The advantage of the automatic shift approach is that it is automatic and needs no court intervention for the initial holder’s interest to vest in the backup holder. However, there are some significant concerns for both the present easement holder and the future successive holder:

- It can be challenging to define a triggering condition with sufficient clarity. If the holder ceases operations but never formally dissolves, has it ceased to exist?

- There is no independent arbiter, such as a court, to decide whether the condition has occurred or not *before* the backup holder asserts that it has taken over as easement holder. The backup holder may simply be second-guessing the handling of an easement management issue by the holder. Until the dispute is resolved, perhaps by court action, neither may have clear authority to manage the easement. Any protracted dispute may imperil the conservation objectives.
- The backup holder risks having an easement fall into its hands without any opportunity to investigate the pertinent facts and circumstances that exist at the time of the transfer. (*See* the “Acceptance of Appointment” section below for an explanation of safeguards under Pennsylvania law.)
- Even if the holder’s interest transfers “automatically” as a matter of law, court involvement may still be necessary to resolve title issues, likely in the form of a “quiet title” action.

Recommendation to the Court?

A grant of conservation easement may be written to recommend to a court the identity of a substitute holder—the backup holder—in the event a court finds itself giving an order for a transfer of the easement. But the recommendation will be just that—a recommendation. A court exercising its jurisdiction over the disposition of a charitable asset, such as a conservation easement, has complete authority to decide (at the time the issue arises) whether one organization or another is best suited to manage the easement appropriately.

Application to the Model Grant

Subsection 6.01(d) of the *Model Grant of Conservation Easement and Declaration of Covenants* states that:

If Holder fails to abide by the covenants of this section [which set forth the responsibilities of the Holder], a Beneficiary of the Conservation Easement or the Commonwealth of Pennsylvania may petition a court of competent jurisdiction to order the Conservation Easement transferred to a

Qualified Organization ready, willing, and able to abide by such covenants.

To recommend a backup holder, the following sentence could be appended to the provision:

In this event, the undersigned Owner or Owners and Holder recommend that the court transfer the Conservation Easement to [name of Qualified Organization] because of the close match between the Conservation Objectives and the mission and work of [name of Qualified Organization].

Court-Supervised Transfer?

The parties may choose instead to provide a process by which a court will determine whether the initial holder has failed, and to facilitate a transfer to the designated backup holder. For example:

The undersigned Owner or Owners and Holder grant to [name of Qualified Organization] the right to petition a court of competent jurisdiction to appoint [name of Qualified Organization] as holder of this easement should Holder fail to uphold and enforce in perpetuity the restrictions under this grant.

By requiring court involvement for any transfer to occur, this approach avoids the uncertainty of an automatic shift. By providing a right to petition a court directly, this approach also provides a stronger position for the backup holder as compared to a mere recommendation. However, a court exercising discretion will not necessarily be bound to order a transfer to the backup holder designated by the parties.

Holder – Backup Holder Agreement

If the automatic shift approach is used, both the easement holder and backup holder will benefit from clarity about the following issues:

- Who decides if the condition triggering removal has been met? Will an independent arbiter be involved? Will the easement holder be given notice and an opportunity to cure if the backup holder alleges a failure to perform?

- What information, if any, is to be reported to the backup holder on an ongoing basis; for example, monitoring reports on the eased property. What rights does the backup holder have to review the easement holder's management records?
- What rights, if any, does the backup holder have to the stewardship funds, if any, contributed with respect to the property?

These issues can be addressed in a holder-beneficiary agreement if the backup holder is also a beneficiary, or in a freestanding holder-backup holder agreement if the backup holder is not a beneficiary.

Acceptance of Appointment

Sometimes land trusts are named as backup holders without their knowledge or consent. Even those who consent to be named in the grant may not be willing to assume responsibility for a conservation easement without first inquiring into the facts and circumstances: What is the status of the conservation easement, the baseline documentation, and the records evidencing performance of easement management responsibilities? What stewardship funding is available to offset the burden of easement management?

To avoid the possibility of an automatic, self-operating transfer, subsection 4(c) of the CPEA provides that the backup holder is not obligated under the conservation easement unless and until it signs and records an acceptance of the obligation.

Is a Backup Holder a Beneficiary?

A backup holder may be a beneficiary, as described in the first part of this guide, but only if the grant of conservation easement endows it with some present right. For example, a backup holder named only as a suitable substitute holder has no present rights concerning the easement and is therefore not a beneficiary. A backup holder that has the right to petition a court to appoint it as successor upon failure of the initial holder to uphold the easement

has a present enforcement right (albeit a limited one) and is therefore both a backup holder and a beneficiary.

Standing

Under common law, where two parties enter a contract, third parties may have *standing* to enforce aspects of the contract, either by expressed intention of the contracting parties, or, in limited circumstances, by implication.

Section 5 of the CPEA presents a more restrictive threshold. Only listed parties have standing to commence an action affecting the conservation easement. The list includes holders of a third-party right of enforcement, which is defined as:

a right provided in a conservation easement to enforce any of its terms, granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.

Accordingly, an easement beneficiary with a right to enforce any substantive term of a conservation easement has legal standing to bring an action to enforce those terms. Backup holders may also be found to have standing as holders of third-party rights of enforcement, though the language defining the backup holder role will be determinative. For example, a backup holder named only as a recommendation to the court does not have any immediate rights. A backup holder that has a shifting executory interest or an express right to petition the court to appoint a new holder may have standing for those specific purposes.

The state attorney general always has standing to bring a legal or equitable action affecting a conservation easement. As a general rule, a member of the general public lacks standing to bring a legal action to enforce an agreement to which they are not a party. However, any citizen may ask the state attorney general to investigate an alleged dereliction of duty or malfeasance in the management of charitable assets. If the attorney general determines that

court action to replace the holder is necessary and appropriate, the court must allow the attorney general the opportunity to present the case.

The guide *[Standing to Enforce Conservation Easements in Pennsylvania](#)* provides a more thorough review of this topic.



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