What are problematic provisions in conservation easements, and how are land trusts adjusting language to fix those problems for the future?

Abbie Church from Mississippi Valley Conservancy and Andrew Norman from Landmark Conservancy launched discussion with some of their personal experiences dealing with language that was well intentioned, but outdated, in that it does not follow today’s rubric for writing conservation easement provisions on both restrictions and permitted uses.

We first discussed basic tenets that EVERY provision in a conservation easement must meet. We also discussed how critical it is not to include language simply because it was in the last conservation easement your organization wrote (copying over language is a big part of the problem). The group came up with the following.

Conservation Easements provisions should be:

- Enforceable
- Not only enforceable, but something we want to enforce (the “front page of the local newspaper test”)  
- Monitorable (and reasonably monitorable)  
- Reasonable  
- Has clear ties to the Conservation Purposes  
- Not too specific.  
- Not too vague.  
- Makes sense in perpetuity.  
- Meets the IRS requirements for a tax deduction (whether or not the donor/seller intends to take a tax deduction).  
- Meets the land trust’s policies, plans, and procedures, including, but not limited to, the land selection policy and strategic conservation plans.  
- Meets Standards and Practices.  
- Something that is needed.  
- Acceptable to the landowner.  
- Some organizations, like The Prairie Enthusiasts, include appropriate affirmative management rights.

Examples:

1. **Undefined terms**: Trails/Roads Language that allowed trails but prevented logging roads. The lay of the land was such that although a logging trail/road would have impact, it would have less
impact than logging without a new route. Language interchanged: road, farm path, two-track, grass road, path, trail, etc.

Solutions:
   a. Stay away from vernacular that may mean different things to different people, or may mean nothing at all. Define terms. Have a glossary of terms.
   b. Make sure if the provision is “no new trails” or “no new roads” there is a reason for that provision AND that all current trails/roads are documented in the Baseline Documentation Report.

2. Approvals. Problematic language around timing and purpose of requiring the landowner to seek approval for reserved rights. Sometimes it is needed, sometimes it is not. So be strategic and think about every provision.

Solutions:
   a. Have a standard, reasonable time for replying to requests for approvals.
   b. Have a written process that works for your land trust and your capacity.
      i. Some smaller groups had committees and the board involved.
      ii. Larger land trusts handled requests by staff, unless there were problems.
   c. If you have language that the land trust must approve, there should then be parameters around criteria the land trust will be using to judge whether an approval will be granted or not.
   d. Keep meticulous records of requests and denials or approvals. This is critical to fairness and defense.

3. Subdivision. Does a land trust need both a subdivision clause and conveyance clause (required to convey as one parcel even if the property is subdivided)? Example: a landowner needs to create a new tax parcel within their CE property in order to pursue a reserved right, but the CE doesn’t permit subdivisions. This could arise if a CE landowner wanted to build a new building, but the county requires they create a parcel around said building. Technically, creating this parcel isn’t permitted under the subdivision clause. The group discussed how to write the easement to ensure that reserved rights can be exercised without additional subdivision (or allow for that in the easement, or remove the building envelope from the conservation easement; see discussion below).

   Another angle on the conversation is that IF you do want an ironclad clause for no subdivision, there is new language for subdivision crafted after a case in Michigan where the land trust lost at the tax tribunal court level. The landowner’s heirs wanted to divide the property after they inherited it. They won the case, despite very clear language in the easement. But it did not necessarily set precedent because of the level of the court case. However, saying “no subdivision” is no longer sufficient.

4. Third Party Enforcement. A landowner had a third party trespass – a logger that cut trees on the conservation easement property (logging was being done by a neighbor). The timber company told the land trust that they did not have standing to force them to correct the violation.
Solutions: The land trust now has a right for Third Party Enforcement written into their easements. That is, the land trust has standing and the right to work with a third party violator to cure the violation. Not the obligation, but the right.

5. Building Zones. Most of the land trusts in the room are still including building zones as a matter of practice. The great majority of stewardship and management is around provisions in a building envelope. Lots of time wasted on measuring square footage because the easement said the building cannot be expanded by more than xx%. We now realize it is rare that these types of provisions actually matter to the protection of the conservation values. There are certainly exceptions, but as a matter of course the excessive restrictions in building envelopes cause a lot of monitoring, management, and violation issues for not a lot of protection.

Solutions:

   a. Those land trusts that are not including building envelopes encouraged everyone to think hard about excluding the building envelope from the easement itself. Evaluate what is actually likely to be lost from a conservation perspective and don’t seek perfection. Is it worth it?
   b. And if a building envelope cannot be or should not be excluded, then make the provisions within the building envelope wide open. It is part of the easement, but pretty much do whatever you want within the building envelope, within reason (don’t limit buildings or impervious surface, for example).

6. Economic Activity

   a. Do not include restrictions on economic activity unless you can tie those directly to a significant impact on the protection of the conservation values. That is, who cares if someone runs a yoga studio or has a roadside stand to sell vegetables?
   b. Don’t include language just because it has always been in the easement.
   c. A lot of farms and ranches depend on non-ag related income to stay afloat. Don’t restrict that, because if you do, you run the risk of the farmer/rancher not being able to maintain the farm/ranch. Agri-tourism or hunting retreats are examples, as is value added agricultural activities (commercial kitchens, for example).