

## Denman Conservancy Association (DCA)

# Covenant Enforcement Policy & Breach Investigation and Covenant Enforcement Procedure

### Purpose

To establish a covenant enforcement policy for covenants held by DCA in order to maintain continued covenant compliance. To establish a consistent process for investigating reported breaches and pursuing enforcement on DCA covenanted properties

### Background

DCA holds conservation covenants on land owned by third parties. DCA holds these covenants in perpetuity, and conducts annual monitoring of each covenanted property to ensure compliance with the covenant. A covenant is a contract between the landowner and the covenant holder, and any action or inaction contrary to the terms of the covenant is a breach of that contract. It is DCA's responsibility, as a covenant holder, to ensure compliance with the terms of the covenant and to consider enforcement in the event of a breach. The Canadian Land Trust Alliance Standards and Practices for Land Trusts requires land trusts to have a policy detailing how they will respond to potential violations of conservation covenants, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. Taking a consistent approach to enforcement is critical to both protect the ecological values of the covenanted land, and to ensure the DCA retains its ability to enforce the covenant should legal action become necessary.

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### A. Policy - Breach Investigation

1. DCA has both the authority and the responsibility, as a covenant holder, to monitor and enforce compliance with the terms of its covenants. Where there may be a breach of a covenant, it is DCA's responsibility to investigate the suspected breach.
2. DCA may undertake a covenant breach investigation in the following circumstances:
  - (a) a covenant breach is observed through an annual monitoring visit;
  - (b) a written or oral complaint of a breach by any person is submitted to DCA;
  - (c) contractors to DCA observe a breach;

- (d) a referral is received from a permitting agency that identifies covenant breaches associated with the permit request; or
- (e) DCA receives information from any other reliable source that there may be a covenant breach.

3. Breach investigation will follow the procedure outlined below

Persons whose actions are being investigated in relation to covenant breaches will be instructed to cease the activity and will be given the opportunity, where possible, to achieve voluntary compliance before further action is taken.

**B. Policy – Voluntary Compliance and Enforcement Remedies**

- 1. DCA will in all cases attempt to seek voluntary compliance and remediation by the landowner, in accordance with the Breach Investigation and Covenant Enforcement Procedure below.
- 2. If the parties are unable to reach an agreement regarding voluntary compliance DCA may wish to follow the dispute resolution provisions of the covenant, or engage a mediator to assist in dispute resolution. If mediation does not result in an agreement satisfactory to all parties, DCA may choose to pursue arbitration.
- 3. Where attempts to achieve voluntary compliance fail, and where legal proceedings are proposed, and upon approval by the DCA Board after consultation with the Treasurer in relation to financial implications, the DCA Chair will instruct legal counsel to commence covenant enforcement proceedings.

**C. Policy - Rent Charge Enforcement**

- 1. The rent charge is granted under section 219 of the *Land Title Act* and may be enforced against the landowner in accordance with the terms of the covenant. Rent charge enforcement is the responsibility of the DCA, as covenant holder.
- 2. A decision to enforce a rent charge will be made by the DCA Board, in consultation with legal counsel in accordance with the Breach Investigation and Covenant Enforcement Procedure below.
- 3. If the rent charge is to be enforced, the full amount must be charged.

**D. Policy – Covenants that have received tax receipts through the Ecological Gifts Program**

1. Where a breach occurs on a property which was covenanted through the Ecological Gifts Program, DCA will advise the appropriate federal government department in writing of the breach and actions taken to remedy the breach and enforce the covenant.

### **Procedure – Breach Investigation and Enforcement**

1. DCA Covenant Coordinator will maintain a written record of all breach complaints received and investigations undertaken. Records of breach complaints, investigations and covenant enforcement will be kept in a fireproof file cabinet and in digital format.
2. All correspondence with the landowners regarding an alleged covenant breach shall be sent by registered mail or personally delivered. Dated copies of all correspondence will be kept by the DCA in a fireproof cabinet.
3. DCA will make every effort to keep the personal information of a complainant confidential; however, confidentiality cannot be guaranteed. Personal information may be disclosed in certain circumstances, including during court proceedings or as required under the *Freedom of Information and Protection of Privacy Act*.
4. DCA Covenant Coordinator and Land Manager will conduct a preliminary review of each complaint to determine whether there is sufficient evidence of a breach. Specifically, they will in each case:
  - (a) Review the terms of the covenant to determine whether the suspected breach may be a contravention of one or more terms of the covenant and identify each provision of the covenant that may have been breached by those activities.
  - (b) If there is preliminary evidence of a breach, review the terms of the covenant respecting enforcement and required notification procedures to determine what steps must be followed by the covenant holder and what enforcement options are available.
  - (c) Contact the landowner, informally if appropriate or formally if necessary, to give notice of the suspected breach and, where applicable, request that the landowner cease all activities that are contrary to the terms of the covenant.
  - (d) Conduct a site visit to document any evidence of the alleged breach and assess the extent of any resulting damage to the covenanted lands.
  - (e) Assess all available information respecting the alleged breach and their best judgement to interpret the significance of the breach. This may include consulting with the property owner, as well as seeking legal or other expert advice.
  - (h) If there has been no breach, advise the DCA Board, complainant and the owner of this determination and close the file.

- (i) If there has been a breach, formally notify the property owner in writing as required by the covenant. The notice will outline the nature of the breach, require all contravening activity to immediately cease, and advise that the DCA Board will consider the breach at its next scheduled board meeting.
5. In cases where it appears that the suspected breach is the result of a third party's actions, Covenant Coordinator and Land Manager will work with the landowner to remedy the trespass. When directed by the DCA Board, Covenant Coordinator and Land Manager may assist the landowner to seek damages and remediation from the third party.
6. If the Covenant Coordinator and Land Manager suspect a major breach, they will notify the DCA Board immediately. All breach discussions will be held in camera.
7. The Covenant Coordinator and Land Manager will advise the Board as to whether the breach is a minor breach or a major breach. In assessing whether a breach is minor or major, consideration will be given to whether the breach has damaged species and habitats at risk and/or whether the breach has damaged the Covenant Area and its amenities so as to undermine the original intent for their protection under the covenant
  - (a) A minor breach is one that has resulted in minor or limited damage, or has not resulted in significant permanent damage or alteration of the covenant area.
  - (b) A major breach is one that has caused permanent or extensive damage, or is on-going.
8. Where there is a minor breach, the Covenant Coordinator and Land Manager will recommend to the Board the necessary steps, if any, to be taken by the landowner to remedy the breach. The Covenant Coordinator will communicate with the landowners, in writing and verbally, outlining the breach and the required remedy. Dated records of all communications will be kept DCA in a fireproof cabinet. The Covenant Coordinator will keep the Board updated on the progress of the file.
9. Where there is a major breach, the Covenant Coordinator and Land Manager will prepare a Breach Report which will include a thorough description of the violation, documentation of site visits, photographs, and measurements. They may consult legal counsel to ensure the contents of the report are adequate for legal proceedings, should they be warranted. Specifically, the Breach Report will include:
  - Photographs taken from the standard reference points, where possible.
  - Detailed, written notes and mappings of all damage to the affected amenities. For example, if trees have been cut down, the report would include a record and map of the number of trees cut and the diameter, approximate age and species of each stump. Photographic images of the stump would include a reference object, such as a ruler, to indicate the scale.

- A comparison of the baseline documentation and relevant monitoring records with the changed condition of the site.
- If possible, a signed statement by the landowner confirming that the data collected is an accurate record of the violation.

All written notes and other recorded information must be dated and signed by the Covenant Coordinator and Land Manager.

10. If the Covenant Coordinator and Land Manger are concerned that the activity may also be a violation of a federal or provincial statute, such as the federal *Fisheries Act* or the provincial Riparian Areas Regulation, they will report the activity to the appropriate authorities.

11. The Covenant Coordinator and Land Manger will present the Breach Report to the DCA Board and will outline the options for remedying the breach and pursuing enforcement options. They will recommend a course of action.

12. The Covenant Coordinator will communicate to the landowner, in writing, the requirements for remediation of the breach, including the time limits determined by the Board for voluntary compliance. The letter should include a reference to the Board's enforcement options should the landowner not undertake the remediation, including enforcement of the rent charge. The Covenant Coordinator, Land Manager and DCA Chair (or designate) may meet with the landowner to discuss the required remediation. An acceptable time frame shall be determined by the nature of the breach (minor or major) and risk of further damage should the breach remain unremediated. Consideration shall also be given to optimum seasonal conditions for remediation.

13. *If the landowner voluntarily remedies the breach, Covenant Coordinator and Land Manager will then:*

- Inspect and document the remediation work when it is completed.
- Incorporate the inspection of the remedial measures into the monitoring program for the property.
- Report completion of remediation to the DCA Board.

14. Where the landowner continues the breach activity or fails to undertake required remediation of the damage after the communication from the Covenant Coordinator, he/she will advise the DCA Board at the next regular Board meeting, or if time is of the essence, he/she will immediately advise the DCA Board at a special meeting. The Covenant Coordinator will advise the Board of all available enforcement options at that time, and will provide an estimate of legal costs associated with enforcement after consultation with legal counsel. Should legal costs be estimated to be \$10,000 or more, a Special Resolution will be required to be passed in accordance with DCA By-laws before legal action is initiated.

15. If the DCA Board directs the Covenant Coordinator and Land Manager to enforce the covenant through remediation, they shall remedy the breach or make arrangements to remedy the breach at the cost of the landowner in accordance with the terms of the agreement. Legal action may be taken to recover these

costs if necessary. The decision to embark on remediation shall be guided by a determination by the Board that the landowner has not remedied the breach in an acceptable time frame from the date of notice, in writing and verbally, to the landowner by the Covenant Coordinator, outlining the breach, the required remedy and an acceptable time frame for completion of the remediation action(s).

Adopted by the Board, June 2014