

## Handout for **Trending Topics in Fee Land & Conservation Easement Stewardship**

Land Trust Alliance Rally, Pittsburgh, PA, October 12, 2018

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**NOTE: See this session's presentation on LTA's website for context and complete resources.**

Trending Topics (as observed from Terrafirma, LTA, national leaders):

- **Trespass Encroachment** – trespassers and neighbors are currently some of the largest sources of violations, how do we prevent, find & handle these encroachments?
- **Neighbor Relations** – good neighbor relations reduce encroachment violations (tools, case example)
- **Tools for Valuing Damage** – methods to put a monetary value on damage caused by an encroachment
- **Management plan prep** – how do we get these plans done efficiently?

ENCROACHMENTS (primary focus)

1. **PREVENT** – 2 things, **clear boundary lines** & **pro-active relationships with neighbors**, can greatly reduce violations (and/or help the land trust's case against a bad actor)
    - a. Make sure boundary lines are clear
      - i. Signs
        - Posting takes time and resources, but often less costly than dealing with cost of violation encroachment
        - Signs not only mark boundary, but can communicate educational messaging, property rules, liability concerns, etc.
        - Consider building into initial survey costs, have surveyor post signs
      -  *PRO TIP: If your surveyor posts your boundary with signs, have surveyor hold on posting until just before closing/just after, in case project falls through.*
      - For older unposted properties, can you contract with original surveyor to post lines?
      - What about properties without a survey? (If lines are difficult to post, consider a survey, as perhaps less costly than dealing with an encroachment violation.)
    - ii. Paint
    - iii. **RECORD** how boundaries are marked (many ways to do this: survey (fences, etc), survey contract, baseline, monitoring maps or text)
      - Annually document condition of marking on boundaries observed (documentation on condition of lines over time can help you when trespassing neighbor claims they didn't know where the line was, signs were no longer up, etc.)
  - b. Relationships with neighboring landowners
    - i. Communicate *before* there's an issue:
      - Post boundaries (at least this alerts them)
      - Send neighbors a letter post-closing (Congrats! You live next to conserved property! Here are the lines, respect the boundary.)
      - Personally meet neighbors, organize a meet-the-neighbors community event
    -  *PRO TIP: Closings are crazy. Add neighbor communication to your closing checklist so it doesn't get forgotten. PRO TIP: LISTEN*
2. **FIND** – monitor boundaries annually
  - a. Best to walk boundaries, but with a lot of long, complicated boundaries, it can be difficult to walk all boundaries annually.
    - i. Hit your high-risk boundaries often and consider a schedule to cover a property's boundaries every \_\_\_ years.
    - ii. **HOWEVER**, know that there is a Terrafirma timing issue – encroachments need to be found within the policy period year, or coverage can be denied. If it is not possible to walk all boundaries annually, consider using up to date aerial imagery sources to supplement. Review imagery **BEFORE** you go walk the property (so if you find something, you can investigate).

See pg 3 of handout for sample survey contract

See pg 3 of handout for sample language

See pg 3 of handout for imagery sources

### 3. HANDLE

- a. If you have TerraFirma insurance, file a claim or placeholder claim.
- b. Violation Triage
- c. The Big Four (to pursue or not to pursue an (encroachment) violation?):
  - i. Does it impact conservation values/purposes?
  - ii. Does it affect public perception of your land trust?
  - iii. Does it set a negative precedent with your land trust, landowner, or neighbors?
  - iv. Are there any timing or other legal considerations?
- d. See LTA Easement Violation Process Decision Tree attached
- e. Resolution Toolbox
  - i. Education  
 *PRO TIP: DOCUMENT your education efforts and conversations (via email, written material, or memos).*
  - ii. Negotiation  
 *PRO TIP: Electronic communication can escalate more quickly than in-person or phone calls. Attempt to be as personal as possible.*
  - iii. Discretionary Consent  
 *PRO TIP: No discretionary consent clause? Land trusts may still be able to issue a license, waiver, or interpretation of the easement. (Talk to counsel)*
  - iv. Remediation
  - v. Amendments (use sparingly)
  - vi. Further legal action - *legal avenues are covered in "Tackling Trespassers" LTA Rally Session, CLE course*
- f. Evaluating Damage from Encroachment
  - i. Many ways to monetarily evaluate damage , professionals to use include:
    - Larger (in value or size) tree cutting encroachments: use forester for stump cruise to assess value of trees, cost of rehabilitating forest over time
    - Smaller tree cutting encroachments: consider landscape tree appraisal (see page 4 of handout)
    - Other professionals: biologist/ecologist (ecological serves impact, restoration costs); engineer (road decommissioning or grading restoration), landscape architect (ground impact damage, landscape tree value), appraiser (change in value of land – unjust enrichment?)  
 *PRO TIP: Have your attorney hire the professional assessing damages (forester, biologist, etc.), not the land trust.*  
 *PRO TIP: Work with encroacher's homeowner's insurance company to recoup costs of encroachments.*
- g. Adverse Possession Risk – with any encroachment that occurs over time, assess adverse possession risk
  - i. Adverse possession: the occupation of land to which another person has title with the intention of possessing it as one's own
  - ii. Lawn mowing by a neighbor across the line? A shed slightly encroaching? These may raise the risk of adverse possession. Consult your attorney.
  - iii. If land trust decides encroachment is OK (minimal impact to conservation values, worth neighbor relations, etc., consider permissive letters or licenses for the neighbor to use your land for that purpose. This permission may help reduce risk of adverse possession (consult attorney).

#### LAND MANAGEMENT PLANS (brief focus – how do we get these done efficiently?)

1. Minimum accreditation standards for a LMP: 1) identification of conservation values; 2) management goals; 3) activities to achieve management goals.
2. Are you duplicating work between transaction phase and stewardship phase (documentation of conservation values, basic goals, etc.) – can these efforts be streamlined?
3. The more you focus on management goals prior before closing, the better you'll be prepared as a land trust to understand the full needs of the property. (Funds, staff, etc.) And the easier it is to get the management plan done earlier, because you've already made these decisions.

### Sample language from a survey contract for surveyor to mark & post lines with signs:

#### Task #3: Mark exterior boundary lines:

- All boundary marking must be with agreement of landowners
- Only external boundaries will be marked
  - Flag and witness all property corners
  - Flag all property lines with orange flagging
  - Hack and blaze trees along all property lines and paint in orange
  - Post signs, provided by SAHC, at all corners and along property lines following “SAHC Boundary Posting Guidelines”

### Sample language on documenting posting and condition of boundary lines:

**NOT** “boundaries were posted with signs”

**BETTER:** “Boundaries were posted by monitors on this October 2, 2017 visit with SAHC ‘Conservation Area’ signs on the entirety of the northern, southern, and eastern boundaries at intervals of no less than 200’ apart and at all property corners. Monitors used the XX survey to identify the boundary lines.”

**OR**

“boundaries were posted with signs by monitor following ‘Boundary Marking Procedure’”

**MORE LANGUAGE:**

*“Portions of the boundary were posted with SAHC “Conservation Area” signs on this May 17, 2018 visit and a GPS waypoint was taken at each sign posted (see attached map)..”*

*“Monitors posted portions of the boundary with purple paint in accordance with the NC Landowner Protection Act (G.S. 14-159.6); using the xxxx survey, monitors painted an approximately 8" purple vertical blaze, 4-5 feet above the base of the tree and no more than 100 yards apart along the southern, western and eastern property boundaries (see photos #x and x, for example, and monitoring map for location).”*

Also Report annually on boundary conditions observed, regardless if you actually do boundary marking that year (encroacher is going to say they didn’t know where boundaries lines were, but your documentation helps build the case that the lines were visibly marked):

*“Monitors walked the entire western and northern boundaries and observed intact barbed wire fencing, as depicted on the Jones survey, and “Conservation Area” signage along the entire western boundary. Signs appeared placed no less than 200’ apart.”*

### Sources of (some) Aerial Imagery, Orthography, and Satellite Imagery to supplement boundary monitoring:

- Google Earth (you can easily overlay property boundaries)
- <https://earthexplorer.usgs.gov/>
- ESRI, base map layers
- State-flown orthography
- <https://map.openaerialmap.org>
- <https://gisgeography.com/free-satellite-imagery-data-list/>
- [SouthWings](#) (in Southeast, nonprofit flights for conservation – you take photos)

## Action Steps Land Trusts Can Take When Faced with an Encroachment.

In addition to the regular monitoring of properties and easements, each land trust should develop written policies and procedures for resolving encroachment violations. When faced with an encroachment matter, consider the following:

1. Immediate proportional response
2. Neighbor eyes
3. Proactive mitigation
4. Board liaison and full board authority to manage
  - a. Retain Appropriate local counsel
  - b. Confirm insurance coverage
  - c. Have clear goals
5. Exceptional documentation
  - a. Photograph the encroachment;
  - b. Document the encroachment's precise location and aerial extent using GPS/GIS technology;
  - c. Interview neighbors or potential witnesses (a land trust may consider contacting the local police as a part of this process);
  - d. If the encroachment involves significant tree or shrub felling, hire a forester to appraise the loss using *The Guide for Plant* appraisal, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher; <http://www.isa-arbor.com/store/product.aspx?ProductID=93>
6. Send a certified letter to the encroaching party notifying it of the violation and the obligation to restore the property and to inform their insurance carrier of the claim; and
  - a. If the land trust does not receive a response to the letter or the response inadequately ensures the restoration of the property, refer matter to counsel.
7. Strong damages theory
8. In addition to the regular monitoring of land and easements, each land trust should develop written policies and procedures for resolving encroachment violations.
9. Be diligent and resourceful

### Materials

*Enforcing Perpetual Conservation Easements Against Third-Party Violators*, 32 UCLA Journal of Environmental Law & Policy 80 (2014) Jessica E. Jay Copyright © 2014  
<http://www.escholarship.org/uc/item/75z1t5kp>

*Land Conservation Law Case Summaries of Trespass on Conservation Land*, March 2015 Excerpts, Rob Levin

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Link to other landscape tree appraisal resource (Perdue University):

[http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr\\_010078.pdf](http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_010078.pdf)