A08. Tackling Trespassers CLE

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Room 301 A/B

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TACKLING TRESPASSERS

Land trusts can and should tackle trespassers. Trespass is the fastest growing class of conservation easement violations and encroachments on fee conservation land.

The key is how, what, when and who to involve.

This session explores how stewardship personnel manage the fastest growing class of conservation easement violations and fee land damage—those caused by third parties. We will establish the legal bases for reaching trespassers who are not parties to the conservation easement (with or without the landowner’s participation) as well as dealing with the practical realities of fee land trespass.

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1. Overview of Workshop, Law, and Trends
2. Case Story 1 on Fee trespass – Boy Scout Timber Cut: Fee
   a. Brainstorm approaches
   b. Other examples from group
   c. Existing guidance
   d. Stewardship
3. Case Story 2 on Fee trespass – Mineral Trespass: Fee
   a. Brainstorm approaches
   b. Other examples from group
   c. Existing guidance
   d. Stewardship
4. Case Story 3 on CE trespass–Driveway Encroachment: CE
   a. Brainstorm approaches
   b. Other examples from group
   c. Existing guidance
   d. Drafting considerations and options
   e. Stewardship
5. Case Story 4 on CE trespass–Garage Encroachment: CE
   a. Brainstorm approaches
   b. Other examples from group
   c. Existing guidance
   d. Drafting considerations and options
   e. Stewardship
6. What We Learned
7. Remember to complete the evaluations!
A. Overview
1. Conservation easements are a property right and implications of that point.
2. Fee land trespass law well established but land trusts still have perception obstacles.
3. Both the state enabling legislation for conservation easements and the common law regarding negative easements, restrictive covenants and equitable servitudes give land trusts a right of enforcement.
4. Land trust is a directly aggrieved party and thus has standing and other rights against the landowner for the violation, regardless of cause, or the third party.
5. Standing issues can sometimes play a role especially if the land trust fails to enforce.
6. A land trust would only be interested in pursuing judicial remedies against a third party where the landowner is without fault in causing the violation and the landowner wants to avoid being a party to the suit.
7. If landowner is a violator or contributes in any way to the violation, then the land trust can sue the landowner.
8. If the landowner wants to join the suit, land trust likely would not be able to prevent this and likely welcome landowner in the suit as more persuasive to the court.
9. Consider use of criminal actions and statutes and how they fit into the picture, don’t threaten them.

B. The Law
1. Statutory and common law legal options (see Appendix B):
   a. reaching the third party alone (without the landowner’s participation/cooperation);
   b. reaching the third party collaboratively (with landowner's participation);
   c. education of the judiciary, lawyers, stakeholders and general public
2. Cases (see Appendix C, D)
   a. Board of Regents v. Roth, 408 US 564, 577 (1972) established the principle that property interests are created by state law.
   b. Tax court cases recognize state real property law to apply to conservation easements.
      i. State law determines the nature of the property rights, and Federal law determines the appropriate tax treatment of those rights. (Carpenter)
      ii. State law determines whether a baseline may be incorporated by reference into a conservation easement. (Butler)
      iii. Annual monitoring is sufficient to uphold perpetuity and to ensure that reserved rights are not inconsistent uses with the protected conservation purposes. (Butler, Friedberg)
      iv. Existing land-use and zoning regulations may render the donation of an easement as not rising to the level of a "qualified conservation contribution" (Asser [1982 East LLC]) or of no value. (Turner, Herman, Dunlap)
3. Real estate principles provide greater protection to conservation purposes and values and the authority of land trusts to administer conservation easements on a conservation basis rather than using commercial principles prevalent in contract law.
4. Reasonableness doctrine case in point; commercial reasonableness is based on economics and cost benefit analysis; reasonableness in the administration of a real estate interest by a land trust has greater deference and discretion in pursuing purposes that are not economically profitable.
5. Conservation easements should not be subject to rules of the Uniform Commercial Code. These are not commercial endeavors; indeed by their terms conservation easements generally prohibit all but de minimis or fully consistent commercial activities.
6. Traditional real estate law has some overlap with contract law so elements of covenants or mutual agreements in conservation easements are consistent with this principle.

C. Terrafirma Trends and Statistics
1. Surveys and anecdotal evidence shows that successor generation landowners and third parties are the largest sources of CE violations, and neighbors and other stakeholders are the biggest fee land trespassers. (See Appendix F)
2. Fee simple and easement properties are equally likely to be involved in a dispute.
3. 58% of legal issues involved easements; 42% involved fee land.
4. The total cost is only partially attorney fees:
   a. 37% attorney fees, 38% other legal cost,
   b. 25% other costs (restoration, boundary surveys, monitoring, other on the ground expenses)
5. Trespass is second highest violation by type (structures are first)
6. Total trespass claims 3-1-13 through 8-21-18 in three categories: roads/ROWs, vegetation/trees, boundary disputes and encroachments: 123 claims of 517 total claims = trespass is 24% of all claims
First Case Story
Boy Scout: Fee Timber Trespass

Encroachment Event

- Between August and October 2013, Scott Bobby Turner, d/b/a Turner Logging illegally cut, harvested, removed and sold approximately 10 acres of timber from a 103 acre tract owned by SAHC ("Boy Scout Tract").
- Logger accessed SAHC's tract through an adjoining tract owned by neighbor. Neighbor entered a timber cutting contract with logger in August 2013. It was during that time that SAHC believes logger crossed the property line onto SAHC's property and proceeded to cut and remove 10 acres of trees.
- Damage to property: 10 acres were "high-graded" (poor logging practice that degrades long-term forest health), logging skid roads also installed on unsustainable grade and not closed out after logging, resulting in erosion issues.
- SAHC discovered in February 2015, during annual monitoring visit, and filed a Terrafirma claim.
- Approximately 80%-90% of entire logging job was on SAHC's Boy Scout Tract, with very little cutting on neighbor tract with timber contract. This was the second time that logger approached the neighboring about timbering neighbor land. In 2001, neighbor agreed to let logger timber his property. At that time neighbor was provided a survey showing the property line separating SAHC's tract from the neighbor. Also there was a barb wired fence along that section of the property line that would have clearly indicated a separate tract.

Issues

- Trespass event was on a remote, steep area of tract – it is difficult to monitor every boundary line every year on remote, steep terrain tracts.
- SAHC did not have this particular line posted (although there was a remnant boundary line fence, which we discovered in 2015 was cut where logging trucks went through).
- Logger known as disreputable and potentially violent (arrested for assault with axe handle). Logger didn't fully pay neighbor contract amount for timber harvest, so neighbor interested in having logger pursued and was generally cooperative with SAHC in providing information.
- Logger likely to be judgement proof, but SAHC assessed and still deemed it valuable to pursue, primarily to protect landscape and for public/land trust good. Also, even if judgement proof, a lien and/or felony against logger would potentially hamper his abilities to do further business, further harm community landscape.

Legal

SAHC pursued criminal and civil avenues.

Criminal

- Filed report with sheriff, and DA charged logger with felony larceny (Class H) and felony cutting timber. It is rare for a DA to prosecute cases of trespassing logging due to inadequately marked boundary lines (our boundary was not marked with signage in this area) and difficulty demonstrating that the trespasser knowingly and willingly committed the theft. The State decided to drop the case, as it determined it would not be able to prove the criminal elements beyond a reasonable doubt. In interviews, logger claimed he didn’t know he was trespassing (stated he thought he was on neighbor’s land which he had a timber contract for) and a reputable witness couldn’t put him on site.

Civil

- SAHC sued logger, final judgement awarded in favor of SAHC.
  - From Motion for Summary Judgement: "On January 27, 2016, Plaintiff filed a Complaint for trespass, negligence, and conversion against Defendant Scott Turner, individually and doing business as Turner Logging. In its Complaint, Plaintiff alleges that between August and November 2013, the Defendant cut, harvested, and sold timber from the 10 acres owned by the Plaintiff. Complaint at 10. Plaintiff further alleges that the Defendant entered upon Plaintiff’s property and cut its trees without notice to or permission from the Plaintiff. Complaint at 12-13. Plaintiff alleges that it is entitled to damages for the Defendant’s trespass and the wrongful harvesting of the Plaintiff’s trees. Complaint at 19, 24, and 28."
  - Considerations:
    - There are essentially two routes for a civil recovery. Logger can be sued for common law trespass and for a violation of N.C.G.S. 1-539.1. That statute states:
      - Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree there from, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.
    - The Courts have said that the damages available for wrongful tree cutting can be valued in one of two different ways. First, we could seek the difference between the value of the property before the cutting and the value of the property after the cutting. Alternatively, we can seek the value of the timber itself.
We can’t seek both and it is only the second methodology that is subject to the doubling available under the statute. (Attorney)

- Decided the neighbors couldn’t be statutorily liable, as the neighbors were owners of the adjacent property who contracted for the cutting by the logger, as their agent. No case law on this specific issue, but there is case law that supports the argument that a principal can be held liable for the trespass of his agent. However, we don’t believe the doubling of damages, which is punitive in nature, would be available against the neighboring property owners when the only basis for their liability is vicarious – as opposed to showing that they were aware and either implicitly or explicitly authorized his wrongful conduct. (Attorney)

- **Judgment:** Civil liability does not depend on establishing logger’s knowledge that he was crossing onto SAHC’s land, but the responsibility for cutting trees from another’s land falls upon the tree cutter. Judge awarded final judgment in favor of SAHC against logger for logging damage to the Boy Scout property in the full damage amount requested of $195,000, plus allowable costs and prejudgment interest at 8% accruing since the date we filed suit.
  - **Breakdown of Damages:**
    - Value of timber taken, via stump cruise performed by a registered forester: $33,000 for value of timber taken, doubled under NC statute to $66,000.
    - Rehabilitation of forest health, assessed by registered forester: 10 years of ongoing rehab = $46,000
    - Decommissioning logging road: $83,000, as assessed by an Environmental engineer
  - TOTAL: $195,000

- **Collection:** Turner was not present for hearing on Summary Judgment and he fails to file notice of appeal. SAHC continues with collection efforts and Turner claims no exemptions. Motion to Show Cause is filed and granted. Court issues arrest warrant for Mr. Turner until he agrees to appear for the judgment debtor hearing he failed to attend. Order in Aid of Execution filed, logger did not subsequently appear in court to be examined under oath regarding his assets. SAHC’s Order of Contempt granted and Turner is taken into custody, complying with Order in Aid of Execution which does not reveal any substantive assets. Turner filed for Chapter 13 Bankruptcy. SAHC submits Proof of Claim to ensure land trust’s claim is included in those getting paid as part of bankruptcy process. Turner fails to make payments to Chapter 13 Trustee and filed for Motion to Modify Chapter 13 Plan, which was approved by Court. SAHC is awaiting payment.

**Lessons Learned**

- **Post boundaries!** Signage naming land trust, paint also good (harder to take down). (SAHC still working on backlog of older properties that were never posted, don’t have good surveys, etc.)
- Monitoring practices - Keep records showing that boundary line continues to be obvious: In monitoring reports, annually document: 1) condition of boundary line directly observed that year (i.e. “we observed consistent and intact barbed wire fencing”, not just a summary of what has been posted/marked in the past; 2) consider waypointing signs; 3) don’t write “monitors posted and painted boundary during visit” but instead “posted and painted boundary during visit in accordance with SAHC Boundary Posting Procedures” or in accordance with boundary posting statute, etc. to show how it was marked.
- SAHC contracts with surveyor now for every new fee simple and CE property to post boundaries.
- Have attorney directly contract professionals assessing damage, not the land trust.
- Cultivate relationship/education with DA.
- Monitoring practice - Fan of taking “random” photos on boundary lines.
- Walk the entire boundary as part of the baseline or land management plan process. Walk every boundary line once every 3 years on subsequent monitoring visits, supplement with annual review of most recent aerial imagery for boundaries not walked that year.
- Send a letter to all adjacent neighbors, with a survey of your property (although this probably wouldn’t have helped here). Letters are a great outreach/education opportunity, explain purpose for protection, how land will be used (is it open to neighbors for certain uses with a license), benefit afforded to adjacent landowner for never seeing land trust land developed, and potential fundraising tool – membership ask. Really difficult, time consuming to keep up with successive neighboring landowners.
- Be strongly involved in the community (prevents violations, increases your chance you’ll hear about a violation earlier, etc.)

**Second Case Story**

**Fee Mineral Trespass**

- **Encroachment Event**
  - In 2018, former SAHC board member, surveyor, real-estate broker and Western North Carolina county Planning Board member claims he and other family members own the minerals underneath three (3) SAHC preserves, totaling approximately 187 acres (40 acres, 186 acres and 51 acres, respectively)
  - Claims are made at different times throughout the year
- Claimant demands approximately $40,000 in payments to extinguish his mineral claims
- SAHC files Terrafirma claims for all three (3) properties

**Issues**
- Others have paid claimant for mineral rights he allegedly owned on private lands
- Claimant’s professional experience and relationships afford him a position of power and insight
- Because claimant has purchased so many mineral rights in the area, there is potential for future claims on SAHC (and other) lands

**Challenges**
- Two of SAHC preserves have title insurance and mineral rights are an insured interest; SAHC does not have title insurance for 51-acre tract and mineral rights exception listed in 1986 general warranty deed to SAHC
- However, just because SAHC doesn't have defensible title insurance claim doesn't mean we can't defend against a bad act

**Legal**
- SAHC attorney seeks global resolution from title insurer for all three claims
- SAHC counsel retains geologist for mineral evaluation
- Title company unwilling to take up claims for the two insured tracts until claimant takes legal action and shows subsurface mineral rights actually occur on SAHC properties
- Insurer offers nuisance payment to claimant, but claimant rejects offer

**Resolution Process**
- It’s too costly for SAHC to have Court make declaratory mineral rights judgment regarding the validity of claimant’s assertions
- SAHC is employing a “wait-and-see” strategy - If claimant takes legal action against SAHC, then title insurer will pick up claim for the two insured tracts and possibly the third, uninsured tract
- If claimant sues SAHC and loses, he may also lose on other non-SAHC properties because of declaratory judgment
- Uncertain likelihood claimant could feasibly extract minerals from SAHC properties

**Lessons Learned**
- No brainer: make sure you have title insurance and know the mineral ownership/status of the mineral rights associated with the property
- Have counsel obtain specialized reports to keep them protected under attorney-client privilege
- Consider these additional questions:
  - Are minerals economically valuable and is their value worth the cost of extraction? Is extraction practical?
  - Have courts made determinations regarding third-party’s claims?
  - Can mineral claims be physically located on the property in question?
  - Are there county registration fees to maintain mineral claims?
  - Are there other county/state/federal ordinances, setbacks, etc. that would likely prevent extraction?
  - What is the likelihood a state mining permit could be obtained?

**Third Case Story**

**Third Party Driveway Encroachment on a 42-Acre Conservation Easement**

**Trespass Event/Violation**
- Blue Ridge Conservancy accepted a conservation easement on 42 acres of undeveloped land on Beech Mountain in 2008
- In June of 2017 a new driveway to a neighbor’s house was discovered by CE landowner, which was constructed on the CE property without their permission
- The gravel driveway encroached on the CE for 177 feet
- Although the CE allows for a driveway to be built for the reserved residential structure, this was deemed a violation of the CE as the driveway was not associated with a reserved right
- Both the CE boundary survey and neighbor’s boundary survey were recorded so the boundaries were public documents
- The neighbor knew the driveway was constructed on an adjoining property but followed the advice of his realtor to go ahead without a legal agreement
- BRC and the landowner enforced the CE to protect the validity of the CE and to restore the property’s conservation values

**Pertinent CE Language**
- Acts Beyond Grantor’s Control. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury or change in the Property caused by third
properties, resulting from causes beyond Grantors’ control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken in good faith by Grantors under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Property resulting from such action.

- **Disturbance of Natural Features and Plants.** There shall be no cutting or removal of trees, or the disturbance of other natural features in the Property except for the following: (1) as incidental to boundary marking, signage, construction and maintenance of trails and roads allowed herein; (2) selective cutting for personal firewood as described in Article II, Paragraph F and prescribed burning or clearing of vegetation and the application of mutually approved pesticides for fire containment, disease control, restoration of hydrology, wetlands enhancement and/or control of non-native plants; subject however, to the prior approval of Grantee; and (3) to construct allowed structures as described in Article II.

- **Easements.** No easements shall be granted for the placement of roads, driveways, power lines, or utility corridors on the Property except as required in the event of condemnation proceedings by a government body.

- **Enforcement.** A breach of this Conservation Easement can include actions that the Grantor has not completed but has begun to take through either action on the Conservation Area itself or by taking such action, such as a contract with a third party, that could lead to a breach of this Conservation Easement should the contract be performed. The Grantor shall have sixty (60) days after receipt of written notice of a breach of this Conservation Easement to cure the breach. If the breach remains uncured after sixty (60) days, the Grantee may enforce this Conservation Easement by appropriate legal or equitable proceedings including damages, injunctive and other relief. Without limiting the foregoing, the Grantee shall have the power and authority, consistent with statutory authority: (a) to prevent any impairment of the Conservation Area by acts which may be unlawful or in violation of this Conservation Easement; (b) to require restoration of any areas of the Conservation Area damaged by actions that are unlawful or in violation of this Conservation Easement to the condition of the Conservation Area at the time of the grant of this Conservation Easement by Grantor; (c) to otherwise preserve or protect its interest in the Conservation Area; or (d) to seek damages from any appropriate person or entity. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of any term of this Conservation Easement is or would irreparably or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to the Grantee at law or equity in connection with this Conservation Easement.

**Issues**

- The neighbor was trying to sell their house with a very steep driveway and their real estate broker told them to find a better access to improve the marketability of the house
- The real estate broker told the neighbor he would help them secure better access
- There was a misunderstanding between the CE landowner and the neighbors real estate broker regarding where the driveway was to be constructed
- The CE landowner thought the neighbor wanted to construct the driveway on adjoining land he owns that is not encumbered by the CE
- There was also confusion between the neighbor and the town as to the use of an existing road leading to their house, which ultimately became the access to the house
- The neighbor’s real estate broker told them to construct the driveway before legal access was obtained and he would ‘take care of things’ later
- The CE boundary was not marked in this area however the neighbor knew where their property boundary was located
- Once contacted, the neighbor admitted to constructing the driveway without legal permission and agreed to work on a resolution

**Stewardship**

- Communicate with the CE landowner and trespasser to confirm violation occurred
- Take good photo documentation of violation
- BDR photos of the area were helpful in determining the condition of the area prior to the violation for restoration purposes
- Determine the best path forward which included removing the driveway and restoring the area
- Follow up, follow up again, and again to make sure everything is completed as agreed upon

**Challenges**

- When dealing with several parties (land trust, CE landowner, trespasser, realtor) it is important to determine who is responsible for completing each action or activity
• The town was unsure if another house was allowed on the existing road without the road being brought up to current standards (ultimately it was allowed)
• Making sure the landowner follows through with restoring the impacted area as specified in the restoration plan
• Keep in contact with all parties to make sure the issue stays on their radar and they are not trying to ignore it

Resolution Process
• BRC visited the CE property with the landowner and determined it was clearly an encroachment onto the CE
• After consulting with the CE landowner, our attorney and filing a claim with Terrafirma, BRC directly contacted the neighbor about the driveway encroachment
• The neighbor agreed to work with BRC resolve the issue as he knew he was in the wrong
• BRC determined the only way to maintain the integrity of the CE and the conservation values was to have the driveway removed and the property restored
• Several conference calls and meetings were held between all parties to determine the course of action
• After much prodding and stern warnings the neighbor secured another driveway location and removed/restored the encroaching driveway

Lessons Learned
• Post boundaries of CE’s (Many of BRC’s older CE’s are not posted and this is a focus for stewardship staff)
• Monitor boundaries, especially ones with higher potential of trespass and take good photo documentation of those area if it was not covered in the Baseline Report
• Good photo documentation of boundaries with higher potential of trespass (near subdivisions, access points, roads, etc.)
• Set deadlines for tasks to be completed by all parties when trying to resolve a CE violation
• Keep in good contact with the landowner so they stay on your side when enforcing the CE on a third party. In this case the landowner would have agreed to sell a right of way for the driveway to the neighbor if there had not been a CE on the property (He is a really nice guy)
• Remain firm in your demands as the encroaching landowner will always try to take the easy way out
• Maintain good relationships with neighbors and local communities to help spread the word of BRC’s CE properties possibly decreasing the chance of encroachments by neighbors

Fourth Case Story
Third Party Garage Encroachment on a 70-Acre Conservation Easement

Trespass Event/Violation
• Blue Ridge Conservancy accepted a conservation easement on 70 acres of land in 2007
• In October of 2018 the CE landowner had their property surveyed after it was determined the survey with the CE was poorly done
• Between the time the CE was completed and the 2018 survey, a neighboring landowner constructed a house with an attached garage
• The 2018 survey found the neighbors garage and gravel driveway encroached on the CE property by 6.8 feet
• The CE boundary survey was recorded but the neighbor never had their property surveyed
• The neighbor did not know the exact location of their property boundary but instead guessed at the location when siting the house and attached garage
• BRC and the landowner enforced the CE to protect the validity of the CE and to mitigate the impact of the encroachment

Pertinent CE Language
• Acts Beyond Grantor’s Control. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury or change in the Conservation Area caused by third parties, resulting from causes beyond the Grantor’s control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken in good faith by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Conservation Area resulting from such causes.
• Easements. No easements shall be granted for the placement of roads, driveways, power lines, or utility corridors on the Conservation Area except as required in the event of condemnation proceedings by a government body.
• Enforcement. A breach of this Conservation Easement can include actions that the Grantor has not completed but has begun to take through either action on the Conservation Area itself or by taking such action, such as a contract with a third party, that could lead to a breach of this Conservation Easement.
should the contract be performed. The Grantor shall have sixty (60) days after receipt of written notice of a breach of this Conservation Easement to cure the breach. If the breach remains uncured after sixty (60) days, the Grantee may enforce this Conservation Easement by appropriate legal or equitable proceedings including damages, injunctive and other relief. Without limiting the foregoing, the Grantee shall have the power and authority, consistent with statutory authority: (a) to prevent any impairment of the Conservation Area by acts which may be unlawful or in violation of this Conservation Easement; (b) to require restoration of any areas of the Conservation Area damaged by actions that are unlawful or in violation of this Conservation Easement to the condition of the Conservation Area at the time of the grant of this easement by Grantor; (c) to otherwise preserve or protect its interest in the Conservation Area; or (d) to seek damages from any appropriate person or entity. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of any term of this Conservation Easement is or would irreversibly or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to the Grantee at law or equity in connection with this Conservation Easement.

**Issues**
- The exact location of the CE boundary was unknown and hard to locate as it runs in a straight line for 850 feet
- The photos in the Baseline Report did not cover this portion of the boundary
- Original CE survey was determined to be inaccurate after the second survey was completed. Therefore the CE boundary needed to be corrected as well
- Previous volunteer monitors noted a new house was constructed but thought it was entirely on the neighbor’s property
- The landowner was originally not interested in enforcing the CE on the neighbor because the encroachment was located at the back of the property; since it was only 6.8 feet over the property boundary it was not a big deal; and because they did not want to cause ill will in the neighborhood
- Find a viable solution to mitigate the impact of the garage on the CE property

**Challenges**
- This area of the boundary lacked good photo documentation in the Baseline Report
- Convincing the CE landowner we cannot ignore the encroachment and they should work with us on a resolution
- Working with the neighbor to pay for all of the due diligence costs to find a solution
- Initial encroachment predated BRC’s Terrafirma policy so claim was denied. Terrafirma did provide guidance towards a solution

**Stewardship**
- Communicate with the CE landowner and surveyor to confirm violation occurred
- Take good photo documentation of violation
- Organize a meeting between BRC, CE landowner, neighbor and surveyor to make sure everyone is on the same page about the violation and start establishing a path towards a resolution
- Determine the value of the impact to the CE property
- Establish a team of professionals (surveyor, appraiser, ecologist, etc.) to complete the necessary due diligence for the resolution

**Resolution Process**
- BRC visited the CE property with the landowner and determined the garage encroached onto the CE
- The CE landowner made the initial contact with the neighbor to discuss the boundary encroachment and the CE
- The neighbor admitted to not knowing the exact location of the boundary and agreed to work on a resolution
- The updated survey will be recorded, which the CE boundary will be based upon
- Resolution TBD

**Lessons Learned**
- Post boundaries
- Monitor boundaries, especially along areas with neighboring subdivisions
- Good photo documentation of boundaries with higher potential of trespass
- Establish and maintain good relationship with conservation easement landowners
- Use good surveyors
D. Legal avenues/Options

- **By Holder Against Landowner**: violation of enabling statute or other legislation, trespass, nuisance, negligence, breach of contract, criminal trespass;
- **By Holder Against 3d Party, with Landowner Cooperation**: possibly violation of enabling statute or other legislation, trespass, possibly nuisance, negligence, possibly breach of contract though landowner contract relationship with 3d party, or assist landowner, or assign rights, possibly criminal;
- **By Holder Against 3d Party, without Landowner Cooperation**: possibly violation of enabling statute or other legislation, trespass, possibly nuisance, negligence, no contract relationship with 3d party; possibly criminal;
- **Potential Remedies** from Landowner or 3d Party: injunction, restoration, compensatory damages, possibly punitive damages, attorney fees, injunction, restoration, cease and desist, specific performance, monetary damages for value of harm caused by breach, liquidated damages, misdemeanor, felony charges, jail time.

**Standing** is the right to bring a lawsuit.
- Third parties have often/also sued land trusts for perceived failures to enforce
- Generally denied except in a few instances
- Possible Causes of Action: Statutory/Legislative, Property, Tort, Contract, Criminal (See Appendix A)
- For full case listing (See Appendix E)

- Options when the trespasser is unknown

1. **Enforce compliance and protection of conservation values on the CE landowner.**
   a. Benefits include:
      i. Continued protection of conservation values.
      ii. Restoration of impacted habitats.
      iii. Reduce likelihood of repeat trespass by third parties.
   b. Ramifications include:
      i. Lack of landowner participation.
      ii. Costly effort to reduce working landowner relationship.
      iii. High costs of site restoration.

2. **Do nothing**
   a. Benefits include:
      i. Maintain existing relationship with landowner.
      ii. Safety of staff, volunteers and landowners.
   b. Ramifications include:
      i. Conservation values of protected land impacted.
      ii. Repeated use or expansion of location by third party.
      iii. Possible loss of confidence in organization's mission.

3. **Consider external factors that could assist land management approach**
   a. Benefits include:
      i. Reduction of black-market supply and demand.
      ii. Increased safety to Land Trust staff and volunteers.
   b. Ramifications include:
      i. Land Trust taking political action.
      ii. Possible PR difficulties in affected communities.
      iii. Mission drift? Inconsistency with organizational mission?

E. Drafting: Sample CE language (from least to most landowner responsibility)

**LESS LANDOWNER RESPONSIBILITY**

1. **General Easement Examples**
   a. **Responsibilities of Grantor and Grantee Not Affected.** Other than as specified herein, this Deed is not intended to impose any legal or other responsibility on Grantee, or in any way to affect any existing obligations of Grantor as owner of the Property. Additionally, unless otherwise specified below, nothing in this Deed shall require Grantor to take any action to restore the condition of the Property after any Act of God or other event over which Grantor had no control, including acts of third party trespassers. Grantor shall continue to be solely responsible and Grantee shall have no obligation for the upkeep and maintenance of the Property and Grantor understands that nothing in this Deed relieves Grantor of any obligation or restriction on the use of the Property imposed by law.
   b. **Acts Beyond Grantor’s Control.** Nothing contained in this Easement Deed shall be construed to entitle the Trust to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor’s control including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. Grantor is not responsible for acts of third parties who are beyond Grantor’s control; however, Grantor is responsible for guests, invitees, and other third parties within Grantor’s control or authorized by Grantor to access the Property;
c. **Acts Beyond Grantor’s Control.** Nothing contained in this Easement shall be construed to entitle Grantee to bring action against Grantor for any injury or damage to, or change in the Property resulting from natural causes, acts of God, or natural acts beyond Grantor’s control, including without limitation, fire, flood, storm, and earthquakes, or from injury or damage to, or change in the Property resulting from, any prudent and reasonable action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury or damage to the Property resulting from such causes.

2. **Aspen Valley Land Trust**

5. **Rights of Grantee**

   5.3 The right, as an interest owner in the Property (as defined in Section 5.5 below) to prevent or enjoin Grantor or third parties (whether or not invitees of Grantor) from conducting any activity on or use of the Property that is inconsistent with the purposes of the Easement; and the right to require Grantor or third parties, as may be responsible, to restore such areas or features of the Property that are damaged by any inconsistent activity or use, subject to the qualifications of Section 13.5 herein; ...

   5.5. *The right to be recognized as an owner in the interest of the Property represented by this Easement,* and therefore to receive notification from and join Grantor as a party to any leases, surface use agreements, damage agreements or rights-of-way that may be proposed, granted or required hereafter as a result of condemnation or eminent domain proceedings, or for the purpose of exploring for or extracting oil, natural gas or other mineral resources on or below the Property in a manner that has the potential to impact the surface of the Property or its Conservation Values. *The Trust’s rights in participating in or defending the Property from mineral development agreements are more specifically described in Section 7.2 herein.* ...

13.5 **Acts Beyond Grantor’s Control.** Nothing contained in this Easement shall be construed to entitle the Trust to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor’s control or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. *Grantor is not responsible for acts of third parties not authorized to access the Property, but shall be responsible for all third parties, including guests or invitees, authorized by Grantor to access the Property. The Trust retains the right to enforce against third parties for violations of the Easement or damage to the Property pursuant to Section 5.5 herein.*

3. **Aspen Valley Land Trust Optional procedural/collaborative language**

In the event the terms of the Easement are violated by acts of third parties beyond the control of Grantor, including trespassers, or that Grantor could not reasonably have prevented, Grantor agrees, at the Trust’s option, to (a) join in any suit against the third party or parties; (b) assign to the Trust a right of action against the third party or parties; (c) appoint the Trust as attorney-in-fact; and (d) take any action necessary to facilitate the Trust’s pursuit of the third party for the purposes of enforcing, through judicial action or other dispute resolution means, the terms of this Easement against the third party or parties; provided, however, that all costs and attorney fees incurred by the Trust in any such enforcement action to address any damage or injury caused by any third party, and which are not caused by or aggravated by any act or omission of Grantor, shall be borne by the Trust, and Grantor hereby relinquishes any right or claim to any and all reimbursement of costs and fees, including but not limited to attorney fees, and any and all monetary damages or remedies provided, assigned, or directed to the Trust as result of its pursuit of the third party and its pursuit of the restoration of the Conservation Values of the Property, or both. *Grantor agrees to make its best efforts and take all actions practicable to restore the Conservation Values of the Property to their condition prior to the violation, regardless of the outcome of any legal or other action against the third party violator, and the Trust [may elect] agrees to assist therewith. Nothing in this subsection shall prohibit the Trust from pursuing Grantor for violation of the terms of this Easement.*

MODERATE LANDOWNER RESPONSIBILITY

1. **Legacy Land Conservancy**

10.5 Acts Beyond Owner’s Control. Notwithstanding the Owner’s obligations under this Conservation Easement and the Conservancy’s rights to require restoration of the Protected Property pursuant to Section 8.3, the Owner shall have the following rights and obligations for acts or occurrences at the Protected Property beyond the direct or indirect control of the Owner:

   10.5.1 The Conservancy may not bring an action against the Owner for modifications to the Protected Property or damage to the Protected Property or its Conservation Values resulting from natural causes beyond the Owner’s control, including, but not limited to, natural disasters such as unintentional fires, floods, storms, natural earth movement or other acts of God that impair the Conservation Values.

   10.5.2 The Owner shall be responsible for modifications or damage to the Protected Property that impair or damage the Conservation Values at the Protected Property and result from the acts of third parties whose use of or presence on the Protected Property is authorized by the Owner. *Owner shall perform such restoration pursuant to and in accordance with a restoration plan prepared by a competent professional selected by the Owner subject to the reasonable approval of the Conservancy.* The contents of the restoration plan shall be subject to the prior written approval of the Conservancy, which shall not be unreasonably delayed or withheld.
10.5.3 In the event of an unauthorized third-party violation of the Conservation Values on the property, the Conservancy shall not seek restoration or exercise remedies available to it if and so long as the Owner diligently pursues all available legal remedies against the violator. In the event illegal actions taken by unauthorized third parties impair the Conservation Values protected by this Conservation Easement, the Conservancy reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to compel restoration.

SPLIT LANDOWNER RESPONSIBILITY

1. The Jackson Hole Land Trust

7.3 Right to Recover Damages. In the event of a violation of the terms of this Easement, in addition to the other remedies provided for in this paragraph 7, and any other remedies available in law or equity, the Grantee shall also be entitled to recover all damages necessary to place the Grantee in the same position that it would have been in but for the violation. The Parties agree that in determining such damages the following factors, among others, may be considered (i) the costs of restoration of the Property as provided in subparagraph 7.2 above, and (ii) the full market cost of purchasing a conservation easement ...

7.5. Right to Proceed Against Third Parties. The Grantee has the right to proceed against any third party or parties whose actions threaten or damage the Conservation Values, including the right to pursue all remedies and damages provided in this paragraph 7. The Grantor shall cooperate with the Grantee in such proceeding.

7.6. Right to Require Assignment of Trespass Claims. If requested by the Grantee, the Grantor shall assign to the Grantee any cause of action for trespass resulting in damage to the Conservation Values that may be available to such Grantor. The Grantor may condition such assignment to provide for the (i) diligent prosecution of any such action by the Grantee and (ii) division according to the proportionate values determined pursuant to subparagraph 11.1 below, between the Grantee and such Grantor of any recovery, over and above the Grantee's attorney's fees and expenses incurred, and costs of restoration of the Property, resulting from such action.

2. Blackswamp Conservancy

6. Rights of Grantee. To accomplish the purpose and to assure compliance with this Conservation Easement, Grantee shall have the following rights: ***

6.2 The right to prevent Grantor or third persons (whether or not claiming by, through, or under Grantor) from conducting any activity on or use of the Property that is inconsistent with the protection of the Conservation Values or this Conservation Easement, and to require of Grantor or third persons the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use.***

7. Grantee's Remedies.***

7.6 All reasonable costs incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, including, without limitation, costs and expenses of suit and reasonable attorneys’ fees, and any costs of restoration, necessitated by Grantor’s violation of the terms of this Conservation Easement, shall be borne by Grantor.

7.7 Grantee will waive its right to reimbursement under this Section as to Grantor (but not other persons who may be responsible for the violation) if Grantee is reasonably satisfied that the violation was not the fault of Grantor and could not have been anticipated or prevented by Grantor by reasonable means.

7.8 If there is an actual or threatened violation, any delay or omission by Grantee in the exercise of its rights shall not be construed as a waiver or otherwise impair its rights.

8. Acts Beyond Grantor’s Control. Notwithstanding Grantor’s obligations under this Conservation Easement and Grantee’s rights pursuant to Section 7, Grantor shall have the following rights and obligations for acts or occurrences at the Property beyond the direct or indirect control of Grantor:

8.1 Grantee may not bring an action against Grantor for modifications to the Property or damage to the Property or its Conservation Values resulting from natural causes beyond Grantor’s control, including, but not limited to, natural disasters such as unintentional fires, floods, storms, natural earth movement or other acts of God that impair the Conservation Values, or for any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. Notwithstanding the foregoing, nothing contained herein shall limit or preclude Grantor's or Grantee's rights to pursue any third party for damages to the Property from vandalism, trespass, or any other violation of the terms of this Conservation Easement.

8.2 Grantor shall be responsible for modifications or damage to the Property that impair or damage the Conservation Values of the Property and result from the acts of third parties whose use of or presence on the Property is authorized by Grantor. Grantor shall perform such restoration pursuant to and in accordance with a restoration plan prepared by a competent professional selected by Grantor subject to the reasonable approval of Grantee. The contents of the restoration plan shall be subject to the prior written approval of Grantee, which shall not be unreasonably delayed or withheld.

8.3 In the event of an unauthorized third-party violation of the Conservation Values of the Property, Grantee shall not seek restoration or exercise remedies available to it if and so long as Grantor diligently pursues all available legal remedies against the violator. In the event illegal actions taken by unauthorized third parties impair the Conservation Values protected by this Conservation Easement, Grantee reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to compel restoration.
3. Vermont Land Trust  
Enforcement of the Covenants and Restrictions: ***

Grantors are responsible for the acts and omissions of persons acting on their behalf, at their direction or with their permission, and Grantee shall have the right to enforce against Grantors for events or circumstances of non-compliance with this Grant resulting from such acts or omissions. However, as to the acts or omissions of third parties other than the aforesaid persons, Grantee shall not have a right to enforce against Grantors unless Grantors are complicit in said acts or omissions, fail to cooperate with Grantee in all respects to halt or abate the event or circumstance of non-compliance resulting from such acts or omissions, or fail to report such acts or omissions to Grantee promptly upon learning of them. Nor shall Grantee institute any enforcement proceeding against Grantors for any change to the Protected Property caused by fire, flood, storm, earthquake or other natural disaster.

Grantee shall have the right, but not the obligation, to pursue all legal and equitable remedies provided under this section against any third party responsible for an event or circumstance of non-compliance with this Grant and Grantors shall, at Grantee’s option, assign their right of action against such third party to Grantee, join Grantee in any suit or action against such third party, or appoint Grantee their attorney in fact for the purpose of pursuing an enforcement suit or action against such third party.

FULL LANDOWNER RESPONSIBILITY  
10.B. Enforcement

Holder has the right to enforce this Conservation Easement by proceedings at law and in equity, including, without limitation, the right to require the restoration of the Protected Property to a condition in compliance herewith. In the event that Holder becomes aware of a violation or threatened violation of the terms of this Easement, Holder shall give written notice to Grantor and request that Grantor take corrective action sufficient to cure the violation or prevent the threatened violation.

Grantor will not be responsible for injury to or change in the Protected Property resulting from natural causes or environmental catastrophe beyond Grantor’s control, such as fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes.

If a court (or other decision-maker chosen by mutual consent of the parties) determines that this Conservation Easement has been breached, Grantor will reimburse Holder for any reasonable costs of enforcement, including court costs, reasonable attorneys’ fees and any other payments ordered by such court or decision-maker.

2. Columbia Land Conservancy  
Acts Beyond Grantor’s Control. Grantor shall not be responsible for any injury or change in the Property resulting from natural events beyond the control of the Grantor. Such natural events include fire, flood, storm, earthquake, tornado, landslide or Acts of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. This paragraph shall not be construed to relieve the Grantor of the obligation to clean-up garbage or materials dumped on the Property by third-parties or to otherwise maintain the Property in a condition consistent with the purposes of this Easement.

D. Forty stewardship suggestions

Land trusts may find that anywhere from 10 to 40 percent of the conservation restriction violations they must address are caused by third parties. Addressing third-party violations requires even more persistence, diplomacy and education than dealing with landowner violations. If a landowner is violating your easement or a neighbor is encroaching on your land, they may never initiate a lawsuit—why should they when they’re getting exactly what they want? Ignoring violations of easements or trespass could confer impermissible private benefit which could result in the land trust losing its tax-exempt status. Even if it looks like you are going to resolve the problem, you never know if it might come unstuck and then your Terrafirma claim might be too late.

1. Draft conservation easement to obligate landowners to prevent trespass or other actions that may lead to violations. (See VLT Letter Explaining Enforcement Appendix D), but recognize that in practice, land trusts find it difficult to enforce a restriction violation against a landowner who did not personally cause the violation.

2. Draft easement to include property interest and explicit rights of entry to enforce restrictions against third parties without joining the owner.

3. Work closely with the landowner to locate the trespasser and pursue a resolution or jointly correct the damage to the property.

4. Hold a meeting with all parties to discuss corrective measures.

5. If the third-party violator cannot be found, or can be found but is unwilling to cooperate, and if the violation also represents criminal trespass or otherwise is a violation of the law, it may be desirable to involve law enforcement officials to discuss resolution options (but do not threaten criminal response).
6. Even if the language of the restriction places the legal responsibility for the violation on the landowner, it is important to try every possible method to hold the third-party violator responsible for remediation of the violation.

7. Consider who is at fault pursuing judicial remedies against a third party when the landowner is without fault in causing the violation and the landowner wants to avoid being a party to the suit. If the owner is a violator or contributes in any way to the restriction violation, then the land trust can sue the landowner, if other violation resolution techniques are not successful.

8. If a third-party violation winds up in court, the judge may look to the conservation easement to determine the intent of the parties and whether the original landowner intended the land trust to have the ability to enforce third-party violations.

9. Consider dealing with nominal encroachments with a license (See Sample, Appendix D).

10. Have a written policy and procedures for addressing third party violations and trespass, and implement Land Trust Standards and Practices.

11. Make annual visits and even multiple visits during the year to the conserved land.

12. Have a great baseline documentation report.

13. Evaluate the resource damage and damage to the purposes of the conservation easement.

14. Consider all the factors, including possible public perceptions, media coverage to date, the resource value of the land, any errors by the land trust, mitigating circumstances, what would best serve the public interest and uphold the land trust mission.

15. Take immediate and appropriate action.

16. Have one person manage communication.

17. Financial resources may be limited, so the land trust will need to be engaged and creative.

18. Document all encroachments and resolution with maps, text and photos or video. Know the error margin of your equipment. Most GPS units have a 3 foot error margin.

19. Document all discussions. Have in writing all approvals, denials and interpretations. Nothing is left for only a verbal conversation without written backup. Accurate, thorough and objective reports documenting visits is critical.

20. Review your options with land trust legal counsel before starting on enforcement. Get a lawyer involved at the very beginning to take advantage of the attorney client privilege. If a lawyer requests documents, they are protected from discovery under the attorney client or attorney work product exceptions.

21. Use appropriate experts to determine resource values and obtained expert advice on the effect of the violations.

22. Consider criminal prosecution in appropriate circumstances; caution in threatening the same.

23. Evaluate government civil enforcement actions in appropriate circumstances.

24. Consider combination approaches to address resource damage rather than attempting to recreate prior conditions.

25. Consider public perceptions of the various parties.

26. Have a solid damages theory, excellent experts and pay attention to legal theory.

27. Don’t be afraid of the jury or the press.


29. Trial and trial preparation is time consuming and expensive. Don’t underestimate the time needed for a case. Assume that a case in litigation will go to trial.

30. Trial strategy starts with pre-trial preparation. Be neutral, reasonable and above any petty fights; protect the land and help resolve the dispute. Be methodical and relentless in legal prosecution of case.

31. Have the attorneys visit the land before developing an approach.

32. Attorney fees may not be not recoverable and are a major financial drain for a community supported non-profit, as are unrecovered staff time and fees.

33. Restoration after all the appeals will take time and money.

34. Legal challenges are very important to establish a track-record of courts upholding conservation. So they are worth the effort to handle well.

35. Make the landowners and the neighbors your allies. This is a critical step for a land trust to maintain its credibility. Have a plan to increase community visibility to minimize violations. PR strategy both with supporters and after settlement. Neighbors watching and reporting for land trust is critical; earlier proactive efforts in neighborhood can be effective in monitoring

36. Review and revise easement template to address new situations and lessons learned.

37. Use hindsight, evaluate your experience, any systems changes suggested and things to do differently.

38. Build partnerships to be ready for the next challenge. Plan for effective publicity strategy

39. Pick up the phone don’t email

40. Effective strategy to leverage insurance including Terrafirma, title insurance, CGL insurance if LT is defendant

General Action Steps to take when faced with an Encroachment:
1. Conduct regular monitoring of preserves and easements.
2. Make sure you have excellent baseline documentation.
3. Enlist neighborhood support to report problems.
4. Call the police (essential, if not always helpful).
5. Demand Publicity!
6. Develop written policies and procedures for responding to potential encroachments

Specific Action Steps to take when faced with an Encroachment:
1. Photograph the encroachment;
2. Document the encroachment’s precise location and areal extent using GPS/GIS technology;
3. Interview neighbors or potential witnesses (a land trust may consider contacting the local police as a part of this process);
4. If the encroachment involves significant tree or shrub felling, hire a licensed forester to appraise the loss using The Guide for Plant appraising, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher;
5. 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;
6. If the land trust does not receive a response to the aforementioned letter or the response inadequately ensures the restoration of the property, refer matter to environmental counsel.

E. Legal Regime Guidance
1. Internal Revenue Code
   A. Require qualified contributions to be of qualified real property interests;
   B. Which are defined as interests in real property, including:
   C. A restriction (granted in perpetuity) on the use which may be made of the real property.
2. Uniform Conservation Easement Act (see your state’s CE or other statutes):
   A. Identifies conservation easements as non-possessory property interests;
   B. Does not explicitly give standing to land trusts to sue a third party;
   C. But it does not prohibit it either.
3. Restatements of Law: Property/Servitudes; Torts; Restitution (see your state’s common laws):
   A. Identified conservation easements as servitudes
   B. Does not explicitly give standing to land trusts to sue a third party;
   C. But does not prohibit it either, and
   D. Encourages courts to vigorously defend conservation easement enforcement through the full panoply of legal and equitable remedies, and damages designed to deter bad acts/actors.
4. State Enabling Acts: A land trust may have standing to sue, depending on state laws if the state enabling act treats conservation easements as a property interest (and almost all do so):
   A. Land trust may have standing under real estate laws; land trust may prevail by arguing that it holds a property right; against which the violator trespassed; so the land trust is a directly aggrieved person and has standing to sue.
   B. If a state does not create a real property right, then argue that legislative intent of the enabling act allows standing;
   C. Most enabling legislation gives a land trust a right of enforcement but not always clear if that right applies to third parties
   D. Objections to land trust exclusive involvement may be based upon:
      i. The failure to include an indispensable person (the landowner);
      ii. And/or the land trust’s possible lack of standing to sue the third party.
   E. If the landowner wants to join the suit, land trust:
      a. Not be able to prevent that;
      b. Would welcome the landowner; and
      c. Would be more persuasive to the court.
6. See North Carolina, Connecticut acts for special provisions relating to enforcement and as relate to case studies (Appendix B)

APPENDIX A. LEGAL AVENUES

<table>
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<tr>
<th>Cause of Action</th>
<th>Statutory/Legislative</th>
<th>Property</th>
<th>Tort</th>
<th>Contract</th>
<th>Criminal</th>
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<tr>
<th>By Holder Against Landowner</th>
<th>Violation of Enabling Statute or other Legislation</th>
<th>Trespass</th>
<th>Nuisance, Trespass, Negligence</th>
<th>Breach of Contract</th>
<th>Criminal Trespass</th>
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<tbody>
<tr>
<td>By Holder Against 3rd Party, with Landowner Cooperation</td>
<td>Possibly Violation of Enabling Statute or other Legislation</td>
<td>Trespass</td>
<td>Possibly Nuisance, Trespass, Negligence</td>
<td>Possibly Breach of Contract though landowner contract relationship with 3rd party, or assist landowner, or assign</td>
<td>Possibly Criminal</td>
</tr>
<tr>
<td>By Holder Against 3rd Party, without Landowner Cooperation</td>
<td>Possibly Violation of Enabling Statute or other Legislation</td>
<td>Trespass</td>
<td>Possibly Nuisance, Trespass, Negligence</td>
<td>No, no contract relationship with 3rd party</td>
<td>Possibly Criminal</td>
</tr>
<tr>
<td>Potential Remedies from landowner or 3rd Party</td>
<td>Injunction, restoration, compensatory damages, possibly punitive damages, attorney fees</td>
<td>Injunction, restoration, compensatory and punitive damages, attorney fees, cease and desist</td>
<td>Injunction, restoration, attorney fees, cease and desist, compensatory or punitive damages</td>
<td>Specific performance, monetary value of harm caused by breach, liquidated damages</td>
<td>Misdemeanor or felony charges, jail time, monetary damages</td>
</tr>
</tbody>
</table>

**APPENDIX B. RELEVANT LAWS**

1. **State Laws:** A land trust may have standing to sue, depending on state laws.
   
   If the state enabling act treats conservation easements as a property interest, land trust may have standing against which the violator trespassed so the land trust is a directly aggrieved person and has standing to sue. If a state does not create a real property right, or not clear holder has right to sue in trespass, then argue that legislative intent of the enabling act allows standing; most enabling legislation give a land trust a right of enforcement; not always clear if that right applies to third parties. Objections to land trust exclusive involvement may be based upon the failure to include an indispensable person (the landowner) and/or the land trust’s possible lack of standing to sue the third party. If the landowner wants to join the suit, land trust likely not able to prevent that and might welcome the landowner, if not culpable, would be more persuasive to the court.

2. **State CE Enabling Statutes: (represented by case-studies and location North Carolina, Connecticut)**

**NORTH CAROLINA CONSERVATION AND HISTORIC PRESERVATION AGREEMENTS ACT**

**Article 4. § 121-34.** Short title. The title of this Article shall be known as the “Conservation and Historic Preservation Agreements Act.”

**§ 121-35. Definitions.**

Subject to any additional definitions contained in this Article, or unless the context otherwise requires:

1. A “conservation agreement” means a right, whether or not stated in the form of a restriction, reservation, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of land or improvement thereon or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, horticultural, farming or forest use, to forbid or limit any or all (i) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (ii) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (iii) removal or destruction of trees, shrubs or other vegetation, (iv) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (v) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (vi) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (vii) other acts or uses detrimental to such retention of land or water areas.

2. "Holder" means any public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision or municipal or public corporation, or any instrumentality of any of the foregoing, any agency, department, or instrumentality of the United States, any nonprofit corporation or trust, or any private corporation or business entity whose purposes include any of those stated in (1) and (3), covering the purposes of...
preservation and conservation agreements.

(3) A "preservation agreement" means a right, whether or not stated in the form of a restriction, reservation, easement, covenant, condition or otherwise, in any deed, will or other instrument executed by or on behalf of the owner of the land or any improvement thereon, or in any other [order] of taking, appropriate to preservation of a structure or site historically significant for its architecture, archaeology or historical associations, to forbid or limit any or all (i) alteration, (ii) alterations in exterior or interior features of the structure, (iii) changes in appearance or condition of the site, (iv) uses not historically appropriate, or (v) other acts or uses supportive of or detrimental to appropriate preservation of the structure or site. (1979, c. 747, s. 2; 1995, c. 443, s. 1.)

§ 121-36. Applicability.
(a) This Article shall apply to all conservation and preservation agreements falling within its terms and conditions.
(b) This Article shall not be construed to make unenforceable any restriction, easement, covenant or condition which does not comply with the requirements of this Article.
(c) This Article shall not be construed to diminish the powers of any public entity, agency, or instrumentality to acquire by purchase, gift, devise, inheritance, eminent domain or otherwise and to use property of any kind for public purposes. (1979, c. 747, s. 3.)

§ 121-37. Acquisition and approval of conservation and preservation agreements.
Subject to the conditions stated in this Article, any holder may, in any manner, acquire, receive or become a party of a conservation agreement or a preservation agreement. (1979, c. 747, s. 4.)

§ 121-38. Validity of agreements.
(a) No conservation or preservation agreement shall be unenforceable because of
   (1) Lack of privity of estate or contract, or
   (2) Lack of benefit to particular land or person, or
   (3) The assignability of the benefit to another holder as defined in this Article.
(b) These agreements are interests in land and may be acquired by any holder in the same manner as it may acquire other interests in land.
(c) These agreements may be effective perpetually or for shorter stipulated periods of time.
(d) These agreements may impose present, future, or continuing obligations on either party to the agreement, or their successors, in furtherance of the purposes of the agreement.
(e) These agreements may contain provisions which require the payment of a fee upon a future conveyance of the property that is subject to the agreement. (1979, c. 747, s. 5; 2008-165, s. 1.)

(a) Conservation or preservation agreements may be enforced by the holder by injunction and other appropriate equitable relief administered or afforded by the courts of this State. Where appropriate under the agreement, damages, or other monetary relief may also be awarded either to the holder or creator of the agreement or either of their successors for breach of any obligations undertaken by either.
(b) Such agreements shall entitle representatives of the holder to enter the involved land or improvement in a reasonable manner and at reasonable times to assure compliance. (1979, c. 747, s. 6.)

§ 121-39.1. Termination or modification of agreements.
(a) Easements secured by the Agricultural Development and Farmland Preservation Trust Fund, including perpetual agricultural conservation easements and forest land easements, military base protection and flyway easements regardless of funding source, or any other agricultural conservation easement that has been secured, in whole or in part, with federal funds and where at least one party to the agreement is a public body of this State, shall not be terminated or modified for the purpose of economic development.
(b) Prior to any modification or termination of a conservation agreement where at least one party to the agreement is a public body of this State, the agency requesting the conservation agreement modification or termination shall conduct a conservation benefit analysis. The criteria for the conservation benefit analysis shall be established by the agency requesting the conservation agreement modification or termination. Conservation agreements may only be modified or terminated if the conservation benefit analysis concludes that the modification or termination results in a greater benefit to conservation purposes consistent with this Article.
(c) The conservation benefit analysis conducted by the requesting agency shall be reported to the Council of State prior to the vote of the Council of State on the final decision to modify the agreement.
(d) Notwithstanding any authority given to a public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision, municipal or public corporation, or any instrumentality of any of the foregoing, to release or terminate conservation easements under other law, this section shall apply to conservation agreements that are intended to be effective perpetually or that are terminated or modified prior to the period of time stipulated in the agreement, and where at least one party to the agreement is a public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision, municipal or public corporation, or any instrumentality of any of the foregoing.
(e) Parties to a conservation agreement may include a provision at the time an agreement is executed requiring the consent of the grantor or the grantor’s successors in interest to terminate or modify the agreement for any purpose.
(f) Any agency managing a conservation agreement program may adopt rules governing its procedure for termination
or modification of a conservation agreement, provided that any such rules may be no less stringent than the requirements of this section.

(g) This section shall not apply to a condemnation action initiated by a condemnor governed by Article 6 of Chapter 40A of the General Statutes or to a voluntary termination or modification affecting no more than the lesser of two percent (2%) or one acre of the total easement area of the conservation agreement when requested by a public utility, the Department of Transportation, or a government entity having eminent domain authority under Article 3 of Chapter 40A of the General Statutes.  (2015-263, s.13(a); 2017-108, s.14.)

§ 121-40. Assessment of land or improvements subject to agreement.
For purposes of taxation, land and improvements subject to a conservation or preservation agreement shall be assessed on the basis of the true value of the land and improvement less any reduction in value caused by the agreement. (1979, c. 747, s. 7.)

§ 121-41. Public recording of agreements.
(a) Except as provided in subsection (c) of this section, conservation agreements shall be recorded in the office of the Register of Deeds of the county or counties in which the subject land or improvement is located, in the same manner as deeds are now recorded.
(b) Releases or terminations of such agreements shall be recorded in the same waiver. Releases or terminations, or the recording entry, shall appropriately identify by date, parties, and book and pages of recording, the agreement which is the subject of the release or termination.
(c) A conservation agreement entered into for the purpose of enrolling real property in a voluntary agricultural district pursuant to G.S. 106-737(4) is not required to be recorded unless such conservation agreement is irrevocable as provided pursuant to G.S. 106-743.2.  (1979, c. 747, s. 8; 2011-219, s. 2.)

NORTH CAROLINA ENVIRONMENTAL BILL OF RIGHTS, North Carolina Constitution, Article XIV, Section 5
Ratified as an amendment to the State Constitution by North Carolinians in a popular referendum in 1972, declares State policy "to conserve and protect its lands and waters for the benefit of all its citizenry" and "to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty." The Constitutional amendment and subsequently the State Nature and Historic Preservation Dedication Act of 1973 authorized the state and local governments to acquire properties or interests in properties to become part of the “State Nature and Historic Preserves” system when accepted by legislative resolution.

CONNECTICUT GENERAL STATUTE 47-42a, 52-560a
Sec. 47-42a. Definitions. For the purposes of sections 47-42b, 47-42c and 47-42d, the following definitions shall apply:

(a) "Conservation restriction" means a limitation, whether or not stated in the form of a restriction, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.

Sec. 47-42b. Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. No conservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas and no preservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes.

Sec. 47-42c. Acquisition of restrictions. Enforcement by Attorney General. Such conservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land. Such restrictions may be enforced by injunction or proceedings in equity. The Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.

Sec. 52-560a. Damages for encroachment on state, municipal or nonprofit land conservation organization open space land. Attorney General enforcement. Civil action. (a) As used in this section, "open space land" includes, but is not limited to, any park, forest, wildlife management area, refuge, preserve, sanctuary, green or wildlife area owned by the state, a political subdivision of the state or a nonprofit land conservation organization and "encroach" means to conduct an activity that causes damage or alteration to the land or vegetation or other features thereon, including, but not limited to, erecting buildings or other structures, constructing roads, driveways or trails, destroying or moving stone walls, cutting trees or other vegetation, removing boundary markers, installing lawns or utilities, or using, storing, or depositing vehicles, materials or debris.

(b) No person may encroach or cause another person to encroach on open space land or on any land for which the state, a political subdivision of the state or a nonprofit land conservation organization holds a conservation easement interest, without the permission of the owner of such open space land or holder of such conservation easement or without other legal authorization.
(c) Any owner of open space land or holder of a conservation easement subject to the provisions of subsection (b) of this section or the Attorney General may bring an action in the superior court for the judicial district where the land is located against any person who violates the provisions of said subsection with respect to such owner's land or land subject to such conservation easement. The court shall order any person who violates the provisions of subsection (b) of this section to restore the land to its condition as it existed prior to such violation or shall award the landowner the costs of such restoration, including reasonable management costs necessary to achieve such restoration. In addition, the court may award reasonable attorney's fees and costs and such injunctive or equitable relief as the court deems appropriate.

(d) In addition to any damages and relief ordered pursuant to subsection (c) of this section, the court may award damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars. In determining the amount of the award, the court shall consider the willfulness of the violation, the extent of damage done to natural resources, if any, the appraised value of any trees or shrubs cut, damaged, or carried away as determined in accordance with the latest revision of The Guide for Plant Appraisal, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher, any economic gain realized by the violator and any other relevant factors.

APPENDIX C. SUMMARY TRESPASS COURT CASES

Trespass cases litigated by land trusts include the following:

- $300,000 spent to defend a conservation easement in California to prevent an adjacent developer from build a road. Garfinkel vs. Nevada County Land Trust, Mary S. Trabucco as Trustee, William J. Trabucco, et al., CA Superior Court (Nevada County), Case No. 71098, Decision CRC 3.1590, 8/21/08 (UNPUBLISHED).
- The East Haddam Land Trust (EHLT) owned a floodplain forest preserve adjacent to the Goodspeed Airport, LLC (Goodspeed). Goodspeed instructed a contractor to clear-cut 2.5 acres of EHLT's land, without EHLT's knowledge or permission. One of EHLT's board directors contacted the state police to report the action and was quoted in a newspaper article as being "appalled" by the tree cutting. Goodspeed instructed logger to ignore certain marked guidelines that marked boundary line. Lamoureux testified that he had第七 grade education, could not read or write, and that he had trespassed he had done so by mistake. Criminal charges brought against Duberry, and jury convicted of theft of property and criminal trespassing. Trial court sentenced him as multiple offender (four prior felony convictions and numerous misdemeanor convictions) to eight years for theft conviction and thirty days for criminal trespassing conviction. Duberry appealed, claiming verdict was in error and sentence too harsh. Appellate court affirmed in all respects.

- State of Tennessee v. Duberry, No. M2013-02121–CCA–R3–CD, 2014 WL 2568849 (Cr. App. Tenn. June 9, 2014)(UNPUBLISHED). Bass owned 403-acre parcel of land in Maury County, managed for recreation and conservation purposes; granted a conservation easement on the parcel to Land Trust for Tennessee (LTT). Duberry inherited abutting parcel; proceeded to cut through a cable and lock across an access road and hired a logger to clearcut a three-acre area on Bass' property. Duberry instructed logger to ignore certain flags that marked boundary line. Duberry claimed the had seventh grade education, could not read or write, and that if he had trespassed he had done so by mistake. Criminal charges brought against Duberry, and jury convicted of theft of property and criminal trespassing. Trial court sentenced him as multiple offender (four prior felony convictions and numerous misdemeanor convictions) to eight years for theft conviction and thirty days for criminal trespassing conviction. Duberry appealed, claiming verdict was in error and sentence too harsh. Appellate court affirmed in all respects.
- Rosa Nulman Park Foundation v. Four Twenty Corp., 93 A.3d 25 (R.I. 2014). Foundation owned four-acre park for benefit of public. Lamoureux built house on what he thought was abutting parcel. Prospective buyer discovered entire structure located on Foundation property. At bench trial, Lamoureux testified cost of removal would be $300,000 to $400,000, if permits could be obtained. Trial court ruled for Foundation, finding encroachment not de minimis and balancing of equities not required, and ordering house removed. Lamoureux appealed. Rhode Island Supreme Court affirmed, holding general remedy for continuing trespass is injunctive relief, and facts did not justify exception to general rule. Supreme Court noted public benefit in keeping entirety of land undeveloped as additional reason to order removal of house.
- Martha's Vineyard Land Bank Commission v. Taylor, 2017 WL 2971866 (Mass. Land Ct., Dukes Cty. July 11, 2017). Land Bank owned remote parcel of land known as Steamboat Landing on Gay Head peninsula of Martha's Vineyard. Taylors owned nearby inn and encouraged guests to use footpath that crossed small section of Steamboat Landing to reach public beach. Land Bank filed suit seeking declaration Taylors and guests had no right to use footpath, with injunction prohibiting such use. Taylors contended they had apportioned prescriptive easement for unrestricted pedestrian use. Judge found Taylors' and guests' past use of Steamboat Landing path was effectively undetectable due to remote and thickly wooded character of parcel, and thus was not "notorious" as law required for establishing prescriptive easement.

- Wellesley Conservation Council, Inc. v. Pereira, No. 17-863, 2018 WL 3298035 (Mass. Super. Ct. Norfolk Cty., June 12, 2018) WCC held conservation easement on 2.75-acre parcel in residential neighborhood purchased by Pereiras adjacent to home, who cleared trees and vegetation from portion of protected property, excavated and, and installed sports court, fencing and lighting. WCC filed enforcement action against Pereiras asserting claim based on Massachusetts' timber trespass statute, which allows up to treble damages for willful violation. Pereiras conceded they violated conservation easement. Court to determine whether WCC was entitled to monetary damages under timber trespass statute or conservation easement enabling statute, and held because neither enabling statute nor easement document explicitly authorized holder to seek damages as a violation remedy, such damages could not be obtained. Court keyd in on word "enforcement" in statute and easement, concluding that this term referred only to restoration, attorney fees, and costs, and also held that because WCC was not owner of protected property, and because Pereiras had not cut trees on "land of another," WCC could not bring an action under timber trespass statute.

- Madison Land Conservation Trust, Inc. v. Suppa, No. CV165037477S, 2018 WL 2596464 (Super. Ct. Conn. Dist. New Haven, May 4, 2018) (Unpublished) Madison Land Conservation Trust (MLCT) acquired parcel along Hammonasset River as part of subdivision approval. In 2016, abutting landowner Suppa clearcut portion of his land and MLCT's property. Suppa cut extensive brush, between 5 to 8 living trees, and one dead tree on MLCT's property. Suppa's cutting activities on his own property and on MLCT's property in violation of Connecticut Environmental Protection Act (CEPA), as he failed to obtain required permit to harvest vegetation in wetlands. Invasive species spread rapidly in newly exposed areas. MLCT devised $28,000 restoration plan for tree and shrub plantings, mulch protections, and five years of oversight to control invasives. Suppa did not agree to plan. MLCT filed suit against Suppa, bringing claims of negligence, common law trespass, violation of the CEPA, and violation of a statute enacted in 2006 that established heightened penalties for trespass on conservation land (Ct. General Statutes § 52-560a). Suppa conceded violated §52-560a and committed common law trespass. Court found Suppa also violated CEPA and actions constituted negligence per se, ordering Suppa to pay $22,000 restoration costs, and to follow restoration plan entailing planting of 12 new trees.

- Sonoma Land Trust v. Thompson, No. SCV-258010 (Super. Ct. Cal., Cty. of Sonoma Apr. 16, 2019) Sonoma Land Trust held donated conservation easement on 34-acre parcel. Thompsons purchased property in 2013 and one year later relocated three mature oak trees from protected property to adjacent parcel on which they were building home. Two trees died shortly after being uprooted, dragged and transplanted. Another tree was not able to be removed because of large boulders entangled in its root system, but also died as a result of attempted transplant. SLT filed suit in 2015 with a bench trial conducted in 2018. Court ruled Thompsons and their LLC jointly and severally liable for "truly extraordinary" violations of conservation easement. Court pointed to California conservation easement enabling statute and common law in determining third parties such as LLC could be liable for easement violations. Court awarded SLT injunctive relief to implement its proposed restoration plan, as well as the full damages amounted requested: restoration costs of $318,870, $73,800 for destruction of three oaks, staff costs of $92,286, and expert costs of $90,493, for a total of $575,899. Pointing to easement itself, the enabling statute, relevant case law and Restatement (Third) of Property, Servitudes, court found appropriate measure of damages was cost to restore property and not loss to fair market value of easement. Restoration costs reflected extensive steps required to bring back native plants and because three mature oaks could not be restored, damages for removal valued using a trunk formula method by a professional arborist. Staff costs awarded because easement's violation provision broadly worded and expressly provided for reimbursement.

- Henstooth Ranch LLC v. Burlington Insurance Company, No. 17-cv-00006-SI, 2018 WL 278619 (N. D. Ca. Jan. 3, 2018), aff'd -- Fed. Appx. --, No. 18-15167, 2019 WL 2207520 (9th Cir. May 22, 2019) LLC owning adjacent parcel of Thompson's above tendered the underlying action to Burlington, which denied coverage. LLC filed suit in state court, and Burlington removed to federal court. Policy defined covered occurrence as an "accident," distinguished from an intentional act. LLC conceded underlying tree removal, road construction and restoration efforts were intentional, but asserted that problems resulting therefrom were accidental, thus triggering Burlington's duty to defend. District court held on summary judgment for Burlington, finding that LLC's flawed restoration efforts were intentional and not accidental. Court found it irrelevant that LLC didn't intend to cause further harm by its restoration efforts, because it acted intentionally in undertaking those efforts. Ninth Circuit
affirmed in brief opinion, holding that as long as underlying actions were intentional, policy exclusion applied regardless of intent to cause injury.

**APPENDIX D. VERMONT LAND TRUST ENFORCEMENT LETTER AND LICENSE**

Re: VLT Enforcement, Monitoring and Costs Policy, Conserved Land in __________, VT

Dear _______:  

I am writing to explain VLT’s philosophy and approach to costs, monitoring and enforcement of our conservation easements. VLT views our relationship with landowners as being a conservation partnership. Folks in our Stewardship office do not think of themselves, nor do they want others to think of them, as the “VLT police.” Rather, we value and strive to maintain an open relationship with owners of conserved land. We welcome inquiries and our Conservation Field Assistants visit each conserved property annually to keep the landowner relationship current and mutually satisfying.

We have been fortunate over the years to enjoy excellent landowner relationships, especially with “first generation” landowners, those who negotiated and signed the conservation easement. Inevitably, however, some situations emerged which necessitated VLT invoking its rights under a conservation easement. In the overwhelming majority of these situations, simple communication with the landowner does the trick. A willful or malicious violation of an easement is virtually unheard of; third party incursions being the more likely source of such a violation in which case we are usually allied with the landowner in seeking a resolution.

We recognize that voluntary resolution is the most effective, quick and cost-effective way to arrive at a mutually agreeable solution to issues and, common sense directs us to strive to achieve resolution in those ways. We frequently hear landowners express confidence in VLT’s willingness to work amicably with a landowner in the event an issue arises under the conservation easement, but that future VLT staff or a successor holder of the easement might not adhere to current VLT policy. Our response is that it is only reasonable to assume that simple cost/benefit analysis dictates that the holder of a conservation easement, unless confronted with a truly egregious, immediate, ongoing violation, to seek resolution first through the more cordial and cost-effective means of communication and negotiation.

For a third party violation of the conservation easement of which the landowner has no knowledge or control, our expectation is that the landowner will cooperate in good faith with VLT in order to curtail the violation and return the property to its pre-violation condition. Such steps include, by way of example, but without limitation, a willingness to cooperate fully as a named plaintiff in suing to stop a third party violation and seeking damages from the third party violator. For those third party violations where the landowner had prior knowledge or has a relationship or contract with the violator, VLT expects the landowner to take full responsibility for stopping and correcting the third party violation. As long as VLT considers that the landowner had no knowledge of and no control over the third party violation and is cooperative in the effort to halt it, VLT will not proceed against the landowner. This limitation applies only to third party violations of this limited type, not to other circumstances that may be covered in Section V.

You asked about the potential for VLT asking for payment of costs associated with voluntary resolution of violations. Again, given the philosophy I outlined above, you can expect that VLT will be reasonable. VLT has resolved almost all violations to date without asking for payment of costs. VLT has asked for payment of costs when correction of the violation needed an easement amendment, for example, or to rearrange reserved rights, or when the violation has been serious and taken significant staff time to correct.

You also asked about cost-sharing with VLT in the event of a third party violation. VLT approaches these situations on a case by case basis. When it is appropriate, we offer an array of free signs to landowners to post who have problems with ATVs or other types of trespass. The landowner and VLT joined together in a few rare cases to sue a third party trespasser because all voluntary remediation efforts failed, and agreed to share costs. More often, landowners are called upon to spend their own funds to correct third party damage without any contribution from VLT. Since you own the land and agreed to the conservation easement that seems equitable. Examples of items which VLT might look to the landowner to cover are installation of water bars that a logger failed to build, removal of trash, erecting gates or other obstructions to motor vehicles, hiring an attorney to force the removal of encroaching structures and recording fees to clarify title.

While uncommon, the most egregious easement violations may necessitate immediate legal action. An obligation in the easement to provide an egregious violator with a lengthy notice period within which to cure a violation or mandatory mediation or arbitration provisions may delay our ability to take the immediate steps required to curtail an activity which, if allowed to continue, might result in serious or irreversible harm to the conserved land. I’m sure you wouldn’t want a successor owner of your land to be able to damage what you have worked so hard to steward because a technicality in the conservation easement prevented VLT from stopping a violation.
It is for this reason that we do not care to include mandatory alternative dispute resolution provisions in our conservation easements. The lack of such mandatory provisions should not be viewed as a strategy to avoid resolution of easement issues through communication, negotiation, mediation or arbitration. We recognize that these are the most efficient and cost-effective ways to arrive at a mutually agreeable resolution to conflict and, as a matter of common sense, VLT would always strive to achieve resolution in those ways.

I hope this letter gives you adequate assurance of VLT’s policy regarding enforcement of conservation easements to permit you to comfortably proceed to conserve your land without further concern. If you have additional questions, we can discuss this further or call our Stewardship Director.

VLT SAMPLE TEMPORARY LICENSE
LIMITED LICENSE TO USE PORTION OF FARMLAND

__________ and ___________ - (the “_________”) both of _________, Vermont, and ___________ - (the “_________”) both of _________, Vermont, hereby agree to the following:

1. The _________ have continuously owned and used ___________ acres of land situated on _________ Road and ___________ Road in _________, Vermont, as part of their _______ since _______. This land is also shown as Lot ___ on a survey entitled ___________ (the “Survey”).
2. The ___________. conveyed a Grant of Development Rights and Conservation Restrictions on the ___________ by _____________ dated ___________ and recorded in the _________ Land Records in Book _________ Page ___.
3. The _____ who own _______ shown on the Survey adjacent to the _________ asked to use a strip of the _________ land of varying dimensions contiguous to the _________ lot ___ for the limited purpose of maintaining a lawn buffer between their lot and the ___________ land (the “strip”). The _________ hereby agree to this lawn buffer on the following conditions:
   a. is for a lawn only and does not include planting trees, bushes, shrubs or other vegetation and does not include any license for any structure, fencing or surfacing of any kind;
   b. is on a year to year basis and is terminable by the ___________ at will without notice;
   c. each spring the ___________ may decide if the said strip needs to be plowed, used for farm machinery access or otherwise used again for agriculture and if the ___________ so elect, they may use said strip for agriculture without notice to the ___________
   d. The ___________ acknowledge that the ___________ on the _____ land were not planted/built by the ___________ and they make no claim to them so the ___________ may remove them in the ___________ - sole discretion;
   and
   f. the _____ waive all claims of ownership, possession or use of said strip for themselves and their heirs, successors and assigns.

WITNESS our hands and seals at ______, Vermont, this ___ day of ___________.

APPENDIX E: STANDING COURT CASES

Standing By Third Party to Bring an Action Affecting a Conservation Easement

Standing Denied (24)


Bleier v. Board of Trustees of Village of East Hampton (violation) 191 A.D.2d 552, 595 N.Y.S.2d 102 (2d Dept. 1993)


Hicks v. Dowd (extinguishment) 157 P.3d 914 (Wyo. 2007)

Huber v. Dept. of Transportation (sale of public land) Mem. 11-67, 2011 Me. Unpub. LEXIS 67 (Me. 2011)(UNPUBLISHED)


Wolf Creek Ski Corporation v. Board of County Commissioners of Mineral County (land swap) 170 P.3d 821 (Colo. App. Ct. September 20, 2007)

Wolfe et al. v. Gormally et al. (adjacent development) 14 LCR 629 (Mass. Land Ct. 2006)

Standing Granted (8)


Friends of the Shawangunks, Inc. v. Clark (amendment) 585 F. Supp. 195 (N.D.N.Y. 1984), reversed on other grounds 754 F.2d 446 (2nd Cir. 1985)


Rosenfeld v. ZBA of Mendon (enforce a deed restriction) Docket 10-P-341 (January 28, 2011) interpreting MGL c. 184 sec. 27


Miscellaneous Standing Cases


United States of America v. 74.05 Acres of Land (federal forfeiture) 2006 U.S. Dist. LEXIS 17060 (D. Conn. Feb. 9, 2006)(UNPUBLISHED)
(Compiled by Leslie Ratley-Beach, Land Trust Alliance Conservation Defense Director)

APPENDIX F: TERRAFIRMA SURVEY RESULTS

Highlights from Terrafirma Aggregate Data
1. California, Florida and New Jersey have significantly higher numbers of challenges per conserved parcel than other states. Colorado has significantly fewer challenges per parcel.
2. California, Colorado and Washington have higher than average external challenge costs than other states.
3. The frequency of challenges dramatically rose from 2000 through 2011. In 2011, a parcel of land was more than twice as likely to have a challenge as that same parcel of land would have been in 2001.
4. The external costs of a challenge in 2006 over four times as costly as a comparable challenge from 2000 or prior. External costs continued a gradual rise from 2006 to 2019.
5. In urban and suburban service areas, challenge frequencies per parcel are almost fifty percent higher than rural areas and the average external challenge costs are almost ninety percent higher. Land in rural areas is less likely to lead to challenges.
6. Unaccredited land trusts are over twenty percent more likely to have a challenge per parcel and pay over fifty percent more in external costs per challenge than accredited land trusts.
7. Challenges brought by the original landowner have external cost severities that are approximately one third the external cost of successor landowner challenges.
8. Parcels of land held by organizations five years old and less are half as likely to produce a challenge as those that have been in existence for ten years or longer.
9. Land Trusts who have experienced even one challenge in the past five years are twice as likely “per parcel” to experience a challenge in the following year than a Land Trust that has experienced no challenges in its past five-year history. Organizations that have experienced over five challenges in the previous five years are four and a half times more likely per parcel to experience another challenge the following year than those trusts that have been challenge-free during that same time.
10. A challenge that has taken four or more calendar years to close is on average almost seven times as costly in regards to external expenses as a challenge that has closed in the same year it opened.
11. Anecdotally, the Alliance is aware of three legal challenges that cost in excess of one million dollars to resolve (CA, NY and PA) and is aware of several others that cost in excess of $250,000 to resolve.
12. Data gathered under different assumptions, definitions and objectives over time by the Land Trust Alliance, while they cannot precisely forecast exact legal defense funding requirements, however, when considered together, do provide a framework for planning legal defense costs:
   - An average land trust can expect violations, including technical, minor and major violations, at a rate of around one easement violation per 20 easements held. (This rate is the total number of easements violated compared to the total number of easements held in the portfolio, as considered over the lifetime of the easement portfolio. It is not an annual rate of new violations.)
   - While many of these violations may be resolved without significant expense, roughly one-tenth of them may require an investment of $1,000 or more.
   - Around one-hundredth of the violations may result in a major expense (costing more than $5,000 to resolve) to the land trust for legal defense.
   - The trends suggest that the frequency and severity of violations will increase over time.
LTA 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);
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](http://www.escholarship.org/uc/item/75z1t5kp)
Permission for Encroachment

Owner: __________________________________________

Property: _________________________________________

Neighbors: _________________________________________

Encroachment: _______________________________________

The Encroachment is more fully described in Exhibit A.

Neighbors have requested Owner’s permission to allow the Encroachment on the Property. Owner is willing to allow such Encroachment on the following terms:

1) Only the existing Encroachment is permitted. It may not be expanded, relocated, restored, or rebuilt. No other access to or use of the Property is permitted by, or may be implied from, this document.

2) Neighbors are solely responsible for compliance of the Encroachment with applicable law and for the safety of all persons and property on or about the Property for reasons directly or indirectly related to the Encroachment (“Neighbor Responsibilities”).

3) Neighbors make the following promises, which Owner is relying upon to grant permission for the Encroachment. For purposes of these promises, the term “Owner” includes the owner identified above, its members, officers, directors, agents, servants, employees, and anyone else holding an interest in the Property.
   a. We will not sue the Owner.
   b. We will not claim any right of ownership, easement, irrevocable license, or other interest adverse to Owner on account of the Encroachment whether the Encroachment existed before or continues after the date of this permission.
   c. We forever release the Owner from any liability for loss or injury to persons or property that are Neighbor Responsibilities.
   d. We will indemnify, defend, and hold harmless the Owner from any loss, liability, damage, or cost of any kind that may occur as a result of injury to any persons or property that are Neighbor Responsibilities.
   e. We agree that the above promises are legally binding even if we contend that the injury or loss is wholly or partly the result of negligence or other conduct on the part of Owner for which a release is not contrary to public policy.
   f. If the Encroachment is related to a recreational use of the Property, we will not claim that we paid any charge for entering the Property for recreational purposes.
   g. We recognize that it is our responsibility to inspect the Encroachment area, to exercise good judgment, to act responsibly, and to obey all of Owner’s oral or written guidance, instructions, and warnings.

4) Owner’s permission constitutes a revocable license under Pennsylvania law and, as such, is exclusive to the undersigned Neighbors, is not transferable, and may be revoked at any time. Unless otherwise directed by Owner, Neighbors must remove the Encroachment upon revocation of the license within the time set by Owner for completion of such removal. Unless otherwise directed by Owner,
removal includes restoration of the Property to its condition prior to the Encroachment in accordance with Owner’s directions.

INTENDING TO BE LEGALLY BOUND, Owner and Neighbors are voluntarily signing below as of ___________________, 20__.

OWNER by:

Signature: ______________________________
Name: ______________________________
Title: ______________________________

NEIGHBORS

______________________________

______________________________

This Model Permission for Encroachment (v. 2019.03.04) is provided by the Pennsylvania Land Trust Association. The Association’s guide Encroachments: Permitting Continued Use Without Risking Loss of Ownership provides context for use of this model. The latest editions of the model and guide can be found at ConservationTools.org.

The model on which this document is based should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. It should be revised under the guidance of legal counsel to reflect the specific situation.