B02. Be Prepared: Don't be Scared: How Terrafirma Helps Meet Risk

Friday, October 18 | 1:30 p.m. - 3 p.m.

Room 205

Session Faculty:
Leslie Ratley-Beach
Carl Silverstein
Sarah Sheeran

Rally 2019: The National Land Conservation Conference
Raleigh, NC

Land Trust Alliance
Together, conserving the places you love
Be prepared; don’t be scared. How Terrafirma helps meet risk.
Friday October 18 | Session B02 | 1:30 p.m. - 3 p.m. | Basic for all | Great for Board Members
CLE and Qualifies for the Terrafirma risk management discount if senior staff or board attends

Three Learning Objectives:
1. Learn from a conservation easement and a preserve challenge as told by land trust staff
2. Examine trends and how that affects drafting and dealing with problems
3. Understand how a board balances risk and assesses mitigation and insurance coverage especially in connection with Land Trust Standards & Practices Standard 6

Session Description:
Terrafirma has been helping member owner land trusts defend their public liability for their conservation portfolios for over six years now. The land trust Executive Director and Stewardship Director will share two stories involving a conservation easement and a preserve that Terrafirma helped them defend. We’ll also discuss practical takeaways and have an open conversation about results, claims trends, forecasts, financial stability, premiums and anything else on your mind about the world’s only conservation defense liability insurance company. This session qualifies for the 2020 Terrafirma risk management discount.

Outline:
1. Introductions
2. Review the flow of the panel
3. The stories
   a. The Boy Scout Preserve
   b. The Willow Cove Conservation Easement
   c. What did we learn?
   d. Compare experiences and techniques
      i. Land Trust Standards and Practices 2017
      ii. Risk Management Drafting Pointers
      iii. Turn off the Nice Switch
      iv. Working with your board and broker to identify where insurance can finance risk
4. Trends and Implications from Six Years of Terrafirma Data
5. What are your risks? What questions do you have?
6. Resources, conclusion and conversation
Panel:

Carl Silverstein has served as executive director of the Southern Appalachian Highlands Conservancy (SAHC), based in Asheville, NC since 2000. He serves on the claims committee of Terrafirma Risk Retention Group. Terrafirma is a charitable risk pool created by the national Land Trust Alliance to insure its members against the legal costs of defending conservation interests. SAHC has protected more than 70,000 acres in the mountains of North Carolina and Tennessee, including the Highlands of Roan, Appalachian Trail countryside, crest of the Black Mountains, Balsam Mountains, and Smoky Mountains. Carl has been called upon to lead SAHC in enforcing its conservation interests against violators in more cases than he wishes to recall.

Sarah Sheeran is the Stewardship Director at Southern Appalachian Highlands Conservancy, which aims to protect the unique plant and animal habitat, clean water, farmland, scenic beauty, and places for people to enjoy outdoor recreation in the mountains of North Carolina and Tennessee. An amateur botanist with a graduate degree in ecology, not to mention four older brothers, Sarah has a discerning eye for detecting trouble of all kinds and the fortitude to see them through. She has helped SAHC oversee multiple Terrafirma claims and pursue criminal and civil judgments.

Facilitator:

Leslie Ratley-Beach, Vice President, Alliance Risk Management Services LLC, Manager for Terrafirma Risk Retention Group LLC, and Conservation Defense Director, Land Trust Alliance, Leslie Ratley-Beach joined the Land Trust Alliance as its first Conservation Defense Director in 2007. Leslie leads the national conservation defense liability insurance program (Terrafirma) and the Alliance's conservation defense center. Previously, she worked with the Vermont Land Trust as stewardship director and project counsel. Leslie has practiced real estate law for over thirty years with an emphasis on conservation and tax law for the last 24 years.

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Comparing and contrasting two Timber Trespass cases

Southern Appalachian Highlands Conservancy

This workshop explores differences and similarities between two timber trespass cases that arose on SAHC properties, focusing on reasons the cases had different outcomes. Take away pointers for improving your practices stewarding conservation interests and pursuing legal remedies for trespass violations are listed below from this comparison.

Willow Cove conservation easement case. Neighbors trespassed on a conservation easement held by the land trust, cutting trees to improve views from their property. This was the easier of the two trespass cases for SAHC to resolve successfully because:

• **Ease of discovery.** The trespass was in an accessible location on a conservation easement boundary abutting a residential neighborhood. The land trust could access the trespass area via the neighbor’s back yard. This factor contributed to the land trust promptly discovering the trespass.

• **Liability insurance.** The neighbors had homeowner insurance that included liability coverage for damage caused by the policyholders’ negligence.

• **Unintentional trespass.** The neighbors made a credible case that they thought the trees were on their land – rather than the neighboring conservation easement – and their homeowners insurance agreed to cover the land trust’s damages claim.

• **Take away pointer.** Have sufficient systems and personnel to rapidly discover problems and address them immediately. Remember to inquire about homeowner’s insurance to pay for damages, costs and fees. Investigate fully, document everything, and then assess appropriate steps.
Boy Scout Preserve case. A logger contracted to cut timber on property adjoining a nature preserve owned by the land trust. Instead of logging the neighbor’s property, he trespassed on the land trust’s preserve instead, and stole 10 acres of trees. SAHC pursued the logger with criminal and civil claims, but this case was challenging for the land trust to resolve successfully because:

- **Delayed discovery.** The timber theft occurred on a steep mountainside in a remote portion of SAHC’s preserve, far from vehicular access by SAHC monitoring staff. SAHC reaches this location by foot travel through the preserve. Vehicular access to the timber theft site is only by a soil skid road created as part of logging operations through the neighbor’s 95-acre mountain property, which SAHC had no legal right to use. SAHC monitored the preserve annually, but did not walk 100% of the boundary every year prior to the theft. Rather, SAHC walked different portions of the boundary each year. These factors contributed to SAHC not discovering the timber theft until a year-and-a-half after it occurred.

- **No liability insurance.** The neighboring landowner did not have liability insurance for the property that he had contracted with the logger to cut. Nor did the logger have insurance.

- **Intentional trespass.** The logger likely intentionally trespassed and cut SAHC’s trees, but the DA dropped the criminal trespass charge because he was not confident of proving it to a jury beyond a reasonable doubt. The logger cut the fence on the boundary between SAHC’s preserve from the neighbor’s property, in order to reach SAHC’s property. SAHC had not posted that boundary, which is an element of the criminal case.

- **Hiding assets and bankruptcy.** SAHC obtained a civil judgment against the logger, but he hid assets and declared bankruptcy. SAHC’s likelihood of collecting meaningful damages is low.

- **Take away pointer.** For remote or difficult access properties, use aerial imagery annually to identify forest canopy openings, new structures, improvements, roads and so forth and other visual violations so that immediate action can be taken. Reach out annually to neighbors so that they understand the property boundaries and that the land trust takes trespass seriously. On Preserves take steps to mark all boundaries. Even on a delayed discovery of a violation, action is essential and effective. This action garnered wide visibility and demonstrated the land trust’s resolve in upholding its obligations. Consider criminal prosecution in appropriate circumstances.
Willow Cove (CE)
Viewshed clearing/Vanity cut
517 acres

November 2016
*November 10, 2016: SAHC discovered violation via on-the-ground monitoring. We estimate the violation occurred in early 2015, based on previous monitoring reports, conversations with landowners and Google Earth satellite imagery. Impacted area estimated to be ~0.5 acres. Survey shows fence line delineates boundary, which was observed on the ground during annual monitoring visit.

January 2017
*Claim submitted to Terrafirma.
*SAHC engages trial attorney, Lach Zemp.

February 2017
*Terrafirma Claims Committee call. Provisional confirmation of coverage.
*SAHC meets with encroaching neighbor, Ms. Mullinax, who takes full responsibility for cutting.
*Stump cruise performed by consulting forester to determine value of timber cut and assess ecological restoration needs, if any. Approximate value of timber is $2,400 and initial restoration costs are $1,800 (assuming access granted through adjacent tract) with annual upkeep costs for 10 years totaling ~$2,800. Cost to rebuild fence is ~$800.

April 2017
*SAHC sends follow-up letter prepared by our attorney to Ms. Mullinax with estimated costs and recommendation she share letter with homeowner's insurance company.

May 2017
*SAHC learns that Ms. Mullinax' property is under contract.

*SAHC attorney reaches out directly to Ms. Mullinax to secure access to restore site/repair fence before property transfers.

June 2017
*SAHC attorney sends $11,000 settlement offer to Ms. Mullinax' insurance carrier, which counter offers at lower amount. Finally settle on $10,000 payment.

July 2017
*An access agreement to access the CE property through the Mullinax tract was executed.

*SAHC signs Release for Property damage in the sum of $10,000.

*Ms. Mullinax transfers the property

*SAHC has fence line reconstructed and marks boundary with signage.

October 2017
*SAHC sends letter to new landowners with survey identifying shared boundary and informs them of past encroachment.
Boy Scout Preserve (FS)
Timber trespass/timber theft
103 acres tract

February 2015:
*February 13, 2015: Violation discovered through on-the-ground monitoring. We estimate violation occurred in Fall 2013 based on previous monitoring reports, conversations with neighbors, Google Earth satellite imagery and a copy of Mr. Turner's logging contract provided by neighbors.
*SAHC contacted State Forest Service's law enforcement division to ascertain legal recourse regarding timber theft.
*Claim submitted to Terrafirma.

March 2015
*SAHC engages trial attorney, Lach Zemp.
*SAHC filed larceny report with County Sheriff's office.
*Stump cruise performed by consulting foresters to determine value of timber stolen; logging area (~10 acres) and skid roads mapped. Value of timber approximated at $33,500.

April 2015
*SAHC pursuing simultaneous criminal and civil charges against Mr. Turner.
*Stump cruise report provided to Sherriff’s department.
*Mr. Zemp reaches out to District Attorney's (DA) office.

*Terrafirma Claims Committee call. Committee requested additional written information and facts.

May 2015
*Terrafirma provisional confirmation of coverage.

July 2015
*Sheriff's office issued warrants for Mr. Turner's arrest - trespass and larceny.

December 2015
*Stewardship monitoring visit - Monitors observe downed and apparently cut barbed wire boundary fencing and remnant logging chains.

January 2016
*SAHC, consulting engineers, foresters and Asst. District Attorney (ADA) conduct site visit and assess restoration costs, which total over $125,000.

February 2016
*Mr. Turner's initial administrative hearing in court.
*Civil complaint and summons served to Mr. Turner, criminal case pending.

May 2016
*DA offers felony plea with probation and restitution. Mr. Turner will only plea to a misdemeanor, not a felony.
May 2016
*Mr. Turner filed Motion to Dismiss (discovered in September, 2016, but never served on SAHC and required to do so by law but Mr. Turner is unrepresented in civil case so SAHC required to answer).

June 2016
*DA arraigns Mr. Turner and sets criminal trial for October 2016.

September 2016
*For civil suit, SAHC files Notice of Hearing on Mr. Turner's Motion to Dismiss.

October 2016
*DA dropping criminal case due to inability to prove criminal elements beyond a reasonable doubt. Voluntary Dismissal filed. SAHC still pursuing civil reparations.

November 2016
*Hearing on Mr. Turner's Motion to Dismiss. SAHC's attorney asks Court to deny motion, Court agreed.
*SAHC attorney submits discovery requests.

December 2016
*Mr. Turner fails to respond within required timeframe to discovery request.

January 2017
*SAHC attorney files Motion for Summary Judgment along with expert affidavits from consulting forester and engineers.
*Mr. Turner was not present for hearing on Summary Judgment. Court grants SAHC motion on both liability and damages and final judgment is made in the amount of $194,647.88 (2X value of timber + restoration costs), not including prejudgment interest since date suit was filed.

February 2017
*Mr. Turner fails to file notice of appeal. SAHC to proceed with collection efforts.

June 2017
*SAHC attorney serves Notice of Right to Claim Exempt Property. Turner claims no exemptions.

September 2017
*Motion to Show Cause filed.

October 2017
*Motion granted; Court issues arrest of Mr. Turner until he agrees to appear for the judgment debtor hearing he failed to attend.

January 2018
*Motion and notice of hearing to allow SAHC's attorney access information pertaining to Mr. Turner's bank account based on new information.

February 2018
*Order in Aid of Execution ordered. Mr. Turner to be questioned under oath regarding his assets.

March 2018
*Mr. Turner failed to appear for Examination Under Oath as order by court. SAHC proceeds with getting Order of Contempt.
October 2018
*Mr. Turner taken into custody and complies with Order in Aid of Execution.

November 2018
*Examination Under Oath completed and no substantive assets identified.

February 2019
*Mr. Turner files for Chapter 13 Bankruptcy.

March 2019
*SAHC submits Proof of Claim to ensure claim is included in those paid through the bankruptcy process.

May-July 2019
*Mr. Turner failed to make payments to Chapter 13 Trustee and filed for Motion to Modify Chapter 13 Plan, which was confirmed by Court.
Action Steps Land Trusts Can Take When Faced with an Encroachment.

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

1. Take immediate proportional steps in response
2. Use neighbor eyes
3. Implement proactive mitigation
4. Manage with a board liaison and full board authority
   a. Retain appropriate local counsel
   b. Confirm insurance coverage
   c. Have clear goals
5. Have 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, call counsel.
7. Have a strong damages theory
8. Develop written policies and procedures for resolving encroachment violations.
9. Be diligent and resourceful

**Materials**

[http://www.escholarship.org/uc/item/75z1t5kp](http://www.escholarship.org/uc/item/75z1t5kp)

*Land Conservation Law Case Summaries of Trespass on Conservation Land*, March 2015 Excerpts, Rob Levin
WHEN TO TURN OFF THE NICE SWITCH

Land trust boards, volunteers or staff may feel reluctant to involve lawyers. You may be tempted to wait to consult an attorney until your land trust is served with a lawsuit or until matters have deteriorated to such an extent that a lawsuit seems inevitable. Having an attorney’s advice before a dispute gets out of hand may help your land trust avoid simple mistakes, such as failure to give adequate notice, failure to gather and preserve necessary evidence and documentation, or failure to note critical conflicts of interest. These failures may become serious obstacles to success.

Avoid errors in strategy, risk management and early dispute resolution by turning to a competent legal advisor with no conflicts of interest when a challenge emerges.

This early outside legal perspective can assist you to get the tone right: not too nice and not too harsh... but just right! Sometimes stewardship staff and board members feel that involving a lawyer seems “aggressive” or could “undermine” collaborative resolution. Turning off the nice switch requires continued professionalism and civil behavior regardless of any others’ behavior; it also means refusing further excuses and delays, and avoiding excessive landowner accommodation.

Involving an attorney early does not mean that staff should give up on negotiations with the landowner. Getting legal advice during formal communications with the landowner will help to protect the land trust’s interest and may prevent litigation entirely. Land trust personnel do not have to tell landowners when they consult a lawyer. In fact, one of the primary benefits of consulting a lawyer is the confidentiality or attorney-client discussions. For example, a land steward may use the distance and lack of bias an attorney brings to a potential violation as a sounding board to discuss difficulties.

The information from these consultations may be protected from discovery if litigation occurs under the attorney-client privilege if the legal advice imparted is kept confidential. If the land trust decides to litigate, it is likely that the land trust’s attorney will handle landowner communications to protect the integrity of the legal process. If that is the case, the land trust will have established a relationship with an attorney who has helped guide the land trust through negotiations so the land trust can litigate successfully.

Consider involving a different outside attorney than the land trust’s usual transactional attorney to give a fresh point of view on a potential challenge. The attorney who drafted the conservation easement may find it difficult to be dispassionate about the challenge of easement interpretation of a violation. There also may be a conflict in using the same counsel who drafted the easement (or other legal document) if that particular provision becomes the subject of the dispute. Attorneys who are land trust board members should also not represent the land trust nor give legal advice, but attorneys on the board can provide volunteer support to the outside legal team. They can be the liaison to the land trust, clearly communicating information to both outside counsel and the land trust board. This can greatly reduce the costs of dispute resolution, avoid miscommunication, and provide the benefit of their professionalism and acumen.
Warning Signs that Might Indicate it is Time to Turn Off the Nice Switch

- **Multiparty or out-of-state ownership** – Stewardship personnel should be certain that all of the land’s owners and managers are involved in conversations and decisions. If there is reluctance to share information with all of the decision makers, watch out. Avoid assumptions about who has authority to speak for a landowner.

- **Multiple intra-family ownership** – Conflict among multiple family members who are involved in feuds, deaths, multiple generations or divorce always take extra time, money and finesse.

- **Landowners experiencing financial trouble** – Landowners who experience financial hardship may struggle to comply with the easement or they may seek to develop or profit from the land in violation of the easement.

- **Multiple minor ongoing or repeated violations** – Violations that recur or continue after a landowner is advised of the problem, even if the violations are only minor or technical, could signal a likelihood of future noncompliance. Do not let these escalate.

- **Probate, bankruptcy, conservatorship, divorce and so on** – These legal situations likely will not show up on a monitoring report, and there may be no clear physical violation, so they may be more difficult to detect, but can often lead to partition proceedings. Ask tactful questions.

- **Landowner delay or bully tactics** – If a landowner communicates that an issue will be addressed but delays or makes excuses that result in non-action, or attempts to intimidate or bully, the land trust should be on alert and take immediate decisive action.

- **Lack of communication from landowner/reluctance to work with the land trust** – Stewardship personnel should be persistent when dealing with landowners who are difficult to work with or reluctant to communicate.

- **If the situation is complicated** – For example, where a violation is unclear or emotions are running high—obtain legal advice earlier.

- **At the first sign a violation will not be resolved quickly through normal communications.** If phone calls and letters and emails are not returned promptly, stop trying and go to your lawyer. Make a good faith effort with each phone call, email and letter but if no result within a short time, stop waiting.

- **Serious noncompliance issues continue for long periods of time with no measurable progress** – If a landowner stonewalls the land trust or makes repeated excuses about lack of progress toward compliance, this should raise a red flag that litigation may be around the corner. Take immediate action.

- **Non-responsiveness to repeated phone calls or emails** – A landowner who refuses to respond after a violation occurs will likely be difficult to bring into compliance. If landowners stop communicating with the land trust, formal action may be needed.

- **Conservation easements obtained through a zoning permit process, as mitigation or as another requirement** – In these situations, the owner often feels under compulsion, possibly resentful or smarting from litigation. If you have a violation in these circumstances, involve your attorney immediately.

- **Landowner threatens to sue** – Contact a trial attorney immediately; document the threat and take proportional action which may include merely tracking the property more or may involve some special outreach.

- **Executive director or any other staff member or volunteers or board members are served with a lawsuit** – Contact a trial attorney immediately.