

Land Trust's options v. CE Violators

1. Option 1: War, total War, no quarter given.
  - a. Pluses:
    - i. Win or lose, lets the LO know that LO shouldn't play games with the LT.
    - ii. Win or lose, lets the World know that the LT defends its CEs.
    - iii. Win or lose, lets the World (and LO, and the IRS) know that LT holds sufficient resources to fight.
    - iv. A win gives the LT a precedential court decision.
    - v. A win should ensure that LO doesn't play games ever again.
    - vi. A win means LO may be required to pay LT's legal expenses.
  - b. Minuses:
    - i. Litigation is very time consuming – what projects won't LT do while it's immersed in litigation?
    - ii. Litigation is expensive – no guarantee the court will award attorney's fees.
    - iii. Litigation will almost certainly require an appeal; trial courts tend to sympathize with LOs (it is their property...).
    - iv. **A loss is very possible** and could be devastating:
      1. With some CEs, LT could be forced to pay LO's legal expenses (check for loser pays language)
      2. How many other CEs does LT hold that include similar terms? Will those LOs try to take advantage of a loss?
2. Option 2: Settlement.
  - a. Pluses (if settled successfully):
    - i. Lower risk.
    - ii. Lower cost.
    - iii. May reduce LT's time investment in the process.
    - iv. More control over the outcome.
    - v. Opportunities to improve the CE's terms in exchange for changes that don't harm the conservation values and purposes.
    - vi. Opportunities to add more land to the CE?
    - vii. What about a LO cash buy out from the "offending" CE clauses? (hint: NO)
  - b. Minuses:
    - i. Potentially a waste of time. LO may conclude the LT will run out of money before the LO does, so lets the process play out to exhaust the LT, monetarily and emotionally. [Or does LT hold Terrafirma insurance?]
    - ii. The longer "improvements" remain in place, the harder for the trial judge to justify destroying them. LO may play out the process intentionally, not in good faith.
    - iii. Must avoid Impermissible Private Benefit in any settlement agreement. (or not?)
3. Reasonableness and Litigation or Settlement: does the "math" change if the CE states the LT must "not act [or deny] unreasonably"?

## 4. Other Considerations for the Land Trust to consider:

- a. LT's supporters and potential donors will notice whether the LT defends the CE. They want to see a positive conservation outcome. A passive response may throw cold water on supporter and donor support.
- b. How much money can LT afford to invest in the process? Could it bankrupt the LT?
- c. What expenses will Terrafirma cover? (Check with Terrafirma early!)
- d. Do the "Improvements" actually harm the conservation values? If not, why fight?
- e. Do the "Improvements" harm LT's charitable purposes? If not, why fight?
- f. If LT allows Improvements to remain (because they don't harm the CE's conservation values or LT's charitable purposes), how to deal with Impermissible Private Benefit issues (the LO's tax deduction appraisal almost certainly didn't include a discount for these (then potential) improvements)?
- g. Does the potential settlement or judgment comply with Standards and Practices?
- h. For Accredited Land Trusts, does the potential settlement comply with LT's formal policies for amending CEs? (Or can the settlement avoid amending the CE – perhaps a formal policy agreement instead?)
- i. Any "backwater" side issues involved? Past issues with this LO? Past issues as to whether LT should accept this CE? Any "personal" issues that will come up at trial that could embarrass or harm the LT? In short, what might "discovery" unearth in LT's files and emails?
- j. What about the original CE grantor? (if different). What expectations? What do the children think?
- k. How good is the BDR and subsequent annual reports?
- l. Even if the LO's 170h income tax deduction is safe (3-19 year statute of limitations), what about LT's 501c3 status? Could a poor settlement put it at risk? Note: court approved or imposed solution probably protects the LT from IRS claims.
- m. Use court approved settlement proceedings to effectively amend the CE?
- n. In CE = Charitable Trust states, must the AG be involved? [e.g. NH: it depends whether LO took a 170(h) income tax deduction for the CE. How can LT be certain?]
- o. Does the solution set bad precedence? Does precedence matter?
- p. If pushed through trial, how likely the court's decision could set bad legal precedent?
- q. What about using the judicial process to amend the CE, but the changes only apply to future owners?

5. **To Litigate or Not to Litigate** -- Land Trust Alliance Practical Pointers (PP) and support materials to help you decide:
  - a. “Knowing When to Shift Gears” (4 pages, June 2020) (“Hire an attorney early!”)
  - b. “Hiring an Attorney” (5 pages)
  - c. “Interviewing and managing Attorneys” (15 pages)
  - d. “Private Benefit and Related Doctrines” (Attorney Jonathan Blum, 19 pages, June 2015)
  - e. “Terrafirma Tips What We Learned” (3 pages, July 2023)
  - f. Attorney board members (“The Perils of the Board Member Attorney”) (3 pages)
  - g. Replanting Settlement Agreement example (8 pages, 2019)
  - h. Settlement Agreement Rally 2007 (4 pages, 2007)
  - i. Example Settlement Agreement and Mutual Release (9 pages)
  
6. Other Land Trust Alliance Practical Pointers (PP) and support materials include:
  - a. “Steps in a Lawsuit” (32 pages.) (What’s involved in the Litigation “Dance”?)
  - b. PP “Attorney Client Privilege” (2 pages, April 2021)
  - c. PP “Work Product” (2 pages, April 2021)
  - d. Litigation Holds (Examples. What do you mean we can’t delete all our silly emails?)
  - e. “Four Stories about Preserve Trespass” (4 pages)
  - f. “Successfully Surviving Litigation” (Lessons learned from trial, 6 pages July 2023)
  - g. PP “Costs and Fees Recovery” (October 2017) (4 pages, see especially page 2, Excellent Negotiation Suggestions).
  - h. Land Trust Alliance and Vermont Law School: “Practical Pointers for Land Trusts When Facing a Lawsuit or Other Legal Challenge of *Any* Size” (2013) (135 pages)
  - i. Land Trust Alliance: “Drafting Pointers for Risk Balancing in Conservation Easements” (updated December 2022) (6 pages)
  - j. Land Trust Alliance webinar: [Keeping Courts Out of It: Negotiation & Conflict Management Strategies for Violations \(link is external\)](#)
  
7. Standards and Practices (2017 see separate document for details)
  - Standard 6 – Fiscal Health, Risk Management, and Insurance
  - Standard 7 – Need Sufficient Skilled Staff
  - Standard 8 – Evaluating and Selecting Conservation Projects
  - Standard 9 – Check the Property’s Title before Acquiring!
  - Standard 11 – Stewardship, Monitoring, Landowner Relationships, Enforcement
  - Standard 12 – Funding Land Stewardship & Inspecting Land Trust Properties