

# Seventh Symposium on Advanced Legal Topics in Land Conservation

June 13–14, 2019 | Providence, RI | [www.lta.org/legal](http://www.lta.org/legal)



## AGENDA

**Graduate Providence Hotel | Providence, RI**

**Convening leading legal experts and practitioners on emerging issues in land conservation**

### Program Committee

Bill Silberstein	Cathy Howell	Ray Lyons	Leslie Ratley-Beach
Kaplan Kirsch & Rockwell LLP	The Nature Conservancy	Conservation Attorney	Land Trust Alliance

*Thank you to our Sponsors: Kaplan Kirsch & Rockwell LLP, The Conservation Fund and The Nature Conservancy*

*Thank you to the Rhode Island Advisory Committee  
Rupert Friday, Chuck Allott, Jenn Fusco, Joanne Riccitelli and Mike Rubin*

### Wednesday, June 12

6 p.m. – 7 p.m. **Social Hour**

Location: Summit Room, 18<sup>th</sup> Floor

Meet your colleagues and make dinner plans for one of the many great dining spots in Providence.

### Thursday, June 13

#### **DAY ONE – TRENDS**

7:30 a.m. **Registration and Continental Breakfast**

Location: L'Apogee, 17<sup>th</sup> Floor

Location for all Symposium sessions: Biltmore Ballroom, 17<sup>th</sup> Floor

8:45 a.m. **Welcome and Orientation**

*Welcome by Andrew Bowman, President and CEO, Land Trust Alliance (DC)*

*Bill Silberstein, Attorney, Kaplan Kirsch & Rockwell LLP (CO) - Morning Moderator*

*Cathy Howell, Associate General Counsel, The Nature Conservancy (TX) - Afternoon Moderator*

9 a.m. – 10:30 a.m. **Conservation in Court: Trends, Traps and Trouble** with Rob Levin (ME)

This overview will introduce the first day with overall trends and leading cases on structures, buildings and improvements including national trends from Terraforma. Rob will focus on the recent *Pine Mountain Preserve LLLP v. Commissioner* opinion as it relates to the sessions that follow.

10:30 a.m. – 10:45 a.m. **Break**

#### **Conservation Easements – Trend #1: Structures, Buildings and Improvements**

These three sessions will explore the confusion and ambiguities distinguishing “structure” v. “building” v. “improvement” in three discussions of an hour each. We will address the role of zoning in defining building terminology. We will look at specific language and clauses and examine an illustrative “better” clause. This will include a deep dive into the term “structure.” It may be the most important word in a conservation easement, but many drafters never define it. Does that create flexibility or confusion (or differing ideas) about what is a “structure?”

10:45 a.m. – 11:45 a.m. **Conservation Easements - Trend #1A: Laying the Foundation for Structures, Buildings and Improvements** with Pat Pregmon (PA)

What do these words mean in the infinite world of possibilities in, on, over and under land, with aggressive landowners, and for judges still applying common law standards to conservation easements? Courts may look to local land use regulations and zoning laws – which are not likely to be favorable for conservation. How can we do a better job drafting and being mindful of the conservation goals?

1. Do the stated conservation purposes drive and define everything?
2. What is the difference between buildings and structures and improvements? What are the pros and cons of choosing the most inclusive term?
3. What categories (and subcategories) of improvements require differentiation for purposes of application of controls to achieve conservation objectives?
4. Why is control of impervious coverage of improvements important for achievement of certain conservation objectives? Does all impervious coverage need to be counted?
5. Is it a good idea to draft definitions by cross-reference to local law? If so, is it better to use local law as of the easement date or changing over time?
6. How can we draft definitions to minimize challenge?

11:45 a.m. – 12:45 p.m. **Conservation Easements - Trend #1B: Residential Buildings and Structures and their Uses** with Larry Kueter (CO) Ambiguous building restrictions, mobile residences (and tiny houses – on wheels!), guest houses, apartments, employee residences, commercial industrial use spillover with B&Bs and a myriad of other challenges related to residential structures and uses that plague conservation attorneys and stewardship personnel.

1. What do the cases tell us?
2. How can we draft more effectively? What restraints advance the conservation purposes?
3. What makes sense for perpetual stewardship administration of building clauses?
4. Discuss pros and cons of excluding residential building areas.
5. What is the Terrafirma context?
6. Discuss recommended definitions for conservation easements and the impact of each sentence of the definition.

12:45 p.m. – 2 p.m. **Lunch** with informal discussion tables

2 p.m. – 3 p.m. **Conservation Easements - Trend #1C: Nonresidential Buildings, Structures and Improvements and their Uses** with Tamara Galanter (CA)

1. What about structures and buildings that are not residential or residential appurtenant such as commercial or industrial use, structures associated with permitted uses and the range of other nonresidential buildings and structures such as recreational, agricultural, silvicultural and hydrological? What do we do about driveways, roads, utilities, fences, amenities, energy production equipment and facilities, and other earth or riparian disturbance development?
2. What do the cases tell us?
3. What are prudent drafting steps to take to minimize risk?
4. What building restrictions are necessary to protect conservation values?
5. Is allowing a broad range of “agricultural” and “recreational” uses and facilities compatible with conservation properties? Does it advance the conservation purposes?
6. Does distinguishing between commercial and noncommercial uses create further ambiguity and challenges? Does it advance the conservation purposes?
7. What do drafters need to do differently with mineral extraction and other “unsited” disturbances in light of the Pine Mountain decision?
8. What clauses and drafting approaches do the IRS and Tax Court find objectionable?
9. Who gets the benefit of improvements under the “proceeds clause”?

10. What makes sense for perpetual stewardship administration of improvements clauses?
11. What is the Terrafirma context?
12. Discuss specific conservation easement language for non-residential improvements.

3 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:15 p.m. **Conservation Easements - Trend #2: How Judges Think** with Tracy Collins (CT)

What do the cases tell us and what have trial attorneys learned about how judges balance equities, read easements and view conflicts and drafting gaps (and how they approach your evidence)?

1. What evidence a judge wants to see in order to determine if an easement has been violated in the context of the 12-year, multi-court legal challenge *Lyme Land Conservation Trust v Platner*.
2. Clauses that cause judicial (mis)interpretation and specific practice pointers.  
What the cases tell us about stewardship, monitoring, baseline documentation consistency and human variables especially land trust personnel conduct in a dispute.
3. Dissect the recommended interpretation clause for conservation easements and what makes each sentence important.
4. Takeaways focusing on interpretation and what it means for more effective drafting.

4:15 p.m. – 5:15 p.m. **Conservation Easements -Trend #3: Prohibiting Land and Ownership Division: Case Study, Drafting and Lessons** with Carl Silverstein and Hanni Muerdter (NC)

A seemingly simple easement prohibition highlights difficulties with court interpretation and stewardship administration. We will focus on improved drafting, monitoring, prevention and tracking of land and ownership division prohibitions.

1. Discuss the reasons behind the conservation easement prohibition on division of land to protect conservation values.
2. Discuss the division problem areas and how to address them.
3. Focus on the Ohio case of *Taylor v. Taylor* and compare other case law for practice pointers.
4. What balances the risks for stewardship monitoring for the earliest identification of a division violation? How can we prevent this violation and is it worth the effort?
5. What is the Terrafirma context?
6. A real life case study will illustrate some of the dilemmas and choices.
7. Dissect the recommended division clause for conservation easements and what makes each sentence important.

5:20 p.m. **Please Complete your Session Evaluations**

5:30 p.m. – 7 p.m. **Welcome Reception**

Location: Summit Room, 18<sup>th</sup> Floor

**Friday, June 14**

**DAY TWO – TRAPS**

7:30 a.m. **Continental Breakfast**

Location: L'Apogee 17

8:15 a.m. **Welcome Back and Orientation to the Second Day**

*Welcome by Bill Silberstein, Attorney, Kaplan Kirsch & Rockwell LLP (CO)*

*Introductory remarks by Andrew Bowman, President and CEO, Land Trust Alliance (DC)*

*Ray Lyons, Attorney, Ray Lyons - Moderator*

8:30 a.m. – 10:30 a.m. **Loose Lips and Fat Fingers** with Steve Swartz (DC), Sarah Sigman (CA) and Catherine Marrion (CT)

As land trusts mature, staff, volunteers, board members and their attorneys find themselves in court more relating to organizational matters not conservation. Preparation, proper procedures, trained people and a dollop of

pessimism all assist the land trust in balancing risks and achieving a successful result. The seven Ps frame the session on privilege, procedures and ethics.

1. Pessimism – Murphy was an optimist!
2. Preparation – Prepare now for the litigation that almost certainly will come in the future.
3. Procedures – Structure your operation with litigation in mind and follow the procedures you put in place as a result.
4. People – Having the right people in the right roles and everyone understanding what they are.
5. Privileges – As lawyers and as clients, understand what protections you have – and don't!
6. Professional Ethics – As attorneys in any role – as actual counsel, staff or board member – understand the professional conduct obligations that apply to those respective functions.
7. Privacy – In a digital world, understanding that what information you keep to yourself is likely a lot less than you'd hope.

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 12:00 p.m. **Avoiding Traps in Applying the Americans with Disabilities Act to Land Trust Lands and Easements** with Rachel Hampton (MN) and Ray Lyons (MA)

When it comes to balancing public access to outdoor areas with land protection, there always seem to be more questions than answers! We will delve into how the Americans with Disabilities Act (ADA) applies to nature preserves and conservation easement properties open to public access.

We will cover requirements for parking areas, signage and trails; access for wheelchairs and Other Power Driven Mobility Devices (OPDMDs); and rules governing Service Animals.

1. When and how does the ADA apply to nature preserves and conservation easement properties open to the public?
2. What do *Land Trust Standards and Practices* require?
3. When must wheelchairs and "Other Power Driven Mobility Devices" be permitted?
4. What are the rules governing Service Animals and how do you manage the results?
5. When must sign language interpreters and other "Auxiliary Aids and Services" be provided?
6. What can you ask a person who claims a disability?
7. Legal Remedies: Who can sue land trusts? What will happen when they do?
8. When will the Department of Justice focus on land conservation organizations?

Noon – 1 p.m. **Traps for the Unwary in Notable Cases** with Rob Levin (ME)

In this fast-paced case update Rob Levin will tell us what we need to know from a handful of recent developments and national trends. We will flag traps to avoid and the means to do so including a summary review of the IRS and Tax Court views on proceeds, modifications and approvals under conservation easements. We will not have time for discussion or questions but Rob and others will be available to continue the conversation over lunch.

**Please Complete your Session Evaluations before Departing**

1 p.m. **Box Lunch Available**

For a fast departure or lunch on the riverfront. After lunch, please join the field trip departing at 2 PM from the hotel lobby.

2 p.m. **Walk Through Time: Historic Providence Walking Tour**

Hosted by former **Rhode Island Assistant Attorney General Mike Rubin**

Mike Rubin will lead us on this hilly three-mile walk through old and new parks in the core of one of the oldest (1636) cities in America — a city which still, to this day, embodies the enlightened spirit of its founder, Roger Williams. This guided tour will visit, among other outdoor sites, Kennedy Plaza, Burnside Park, the city skating rink, Water-Place Park, the Roger Williams National Memorial Site, the Old State House grounds, Prospect Terrace Park and the John Brown House grounds; — all locations with significant open-space and historical value. We will end the formal part of the tour at the Wild Colonial Tavern for refreshments (at individual participants' expense). Participants will then drift, at their own pace, back to the Biltmore Hotel to complete the three-mile loop.