



WHEN TO SHIFT GEARS ON PROBLEM RESOLUTION

Your land trust may feel reluctant to involve an attorney to help you with a conservation problem with a landowner or neighbor. 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. You may be wary of the potential expense of retaining counsel. Shift gears and turn to a competent *outside* legal advisor when a challenge emerges. Having an attorney's advice before a dispute gets out of hand can help your land trust avoid errors in strategy, address risk management and pursue early dispute resolution (saving greater costs later).

An early outside legal perspective can assist your approach to problem resolution. Consider:

Landowner communications. Involving an attorney early does not mean that land trust personnel should give up on negotiations with the landowner or assume that a lawsuit is the only recourse. Rather, an attorney can help find the correct tone with which to communicate to difficult landowners. Sometimes, stewardship staff or board members feel that involving a lawyer seems "overly aggressive" or could "undermine" collaborative resolution. Instead, an attorney can act as a sounding board and provide an independent perspective on the situation.

Shifting gears includes maintaining the land trust's professionalism and civil behavior regardless of any others' behavior. It also means declining further excuses and delays, and avoiding excessively accommodating the landowner. Obtaining legal advice during formal communications with the landowner will help to protect the land trust's interest and may prevent litigation entirely. The executive director or stewardship staff can remain the author of the letter that the attorney reviews and edits.

Confidentiality. One of the primary benefits of an attorney is the confidentiality of attorney-client discussions. Under the attorney-client privilege, information from these discussions might be protected from discovery if litigation occurs, and 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 already have established a relationship with an attorney who has helped guide the land trust through negotiations so the land trust can litigate successfully. At the same time, the attorney can advise on how to manage public perception and press requests—so as not to break confidentiality, undermine the land trust's legal position or jeopardize insurance coverage.

Choice of attorney. The land trust should consider involving trial counsel, in place of the land trust's usual transactional attorney, to give a fresh point of view on a potential legal challenge and to provide essential litigation and trial experience. The trial attorney can advise on the substance of the violation and the evidentiary requirements, the complex civil processes and possible dispute resolution tools. The attorney who drafted the conservation easement may find

it difficult to be dispassionate about a challenge that revolves around easement interpretation. There may also be a conflict in using the same counsel who drafted the easement (or other legal document) if a particular provision becomes the subject of the dispute — the drafting attorney could be a potential witness. Attorneys who are land trust board members should also not represent the land trust nor give legal advice -- they can, however, provide volunteer support to the outside legal team, serving as liaison to the land trust and clearly communicating information to both outside counsel and the land trust board. Designating an attorney board member as point person greatly reduces the costs of dispute resolution, avoids miscommunication and provides the benefit of their professionalism and acumen.

Warning Signs Suggesting it is Time to Shift Gears

- *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, corporate or testamentary disputes, 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.
- *Complicated or unclear situations.* Where a violation is unclear or emotions are running high—obtain legal advice earlier.
- *Long-standing, serious noncompliance issues 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.
- *Lack of communication from the landowner or 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.
- *Lack of early resolution.* If the landowner does not respond promptly to the land trust's communications, consult your attorney. Make a good faith effort with each phone call, email and letter but, if there is no response or cooperation within a short time, stop waiting and take action. Document all your attempts. It may be time for formal action.
- *Landowner delay tactics.* If a landowner communicates that an issue will be addressed but delays or makes excuses that result in non-action, the land trust should be on alert and take immediate decisive action.
- *Conservation easements obtained through a zoning permit process, as mitigation or as another requirement.* In these situations, the landowner often feels under duress and is possibly resentful or smarting from litigation. If you have a violation in these circumstances, involve your attorney immediately.
- *Probate, bankruptcy, conservatorship, divorce, receivership, foreclosure.* These circumstances will likely not show up on a monitoring report, and there may be no clear physical

violation, so these legal situations may be more difficult to detect, but they can often lead to partition proceedings. Ask tactful questions. Check the public record if a question arises.

- *Landowner threatens to sue.* Contact your outside attorney immediately; document the threat and take proportional action. Depending on counsel's advice and the situation, this may entail merely monitoring the property more closely and more often or it may involve some special outreach or coordinated response.
- *Service of a lawsuit on the land trust.* Contact a trial attorney immediately.

Lessons from Land Trust Experience

Not every disagreement ends amicably with a mutually agreeable solution. The following pointers are distilled from the experience of many land trusts and include suggestions on how to prepare for litigation and what to do if you face it.

- *Be persistent in communicating with the landowner or a neighbor, even a hostile one.* As soon as you identify a dispute, you must be certain that you are speaking with landowners or landowner agents with clear decision-making authority. Be sure to avoid working through intermediaries or agents unless the landowner absolutely refuses to talk with you. Avoid time gaps between correspondences. Be speedy and proportionately forceful in making sure that conversations take place. Allow cool-down time, but not more than several days, and then try direct conversation again. Once litigation commences, all communication should take place through the attorneys or under their direction. Be certain to document all communications for the project file.
- *Follow your land trust's policies.* Be consistent in how you implement your policies on every property. Consistency can guard the land trust from allegations of disparate or unequal treatment.
- *Attorneys should speak with attorneys.* Beware if a landowner refers all communications to an attorney. If this occurs, land trusts should engage their own counsel immediately to assist in all communications or, in most cases, to take over all communications, attorney to attorney.
- *Take immediate and appropriate action.* When a violation evolves into a major challenge to the land trust, you need to react swiftly, proportionately and firmly. The land trust can't be passive or risk allowing the matter to balloon into a much larger problem. Land trusts need to control these situations and protect conservation values without being overly aggressive. These circumstances require careful judgment and use of sound discretion.
- *Have one person manage communication.* A designated person—whether staff, board member or volunteer—paying close attention to the situation and managing communications is essential. Land trusts must control who speaks for the organization to ensure it speaks with one voice.
- *Designate a point person to communicate with your attorney.* Land trusts must also control who speaks for the organization to its attorney. Depending on the circumstances, the person managing communications may also be the point person for communications between the organization and its attorney.
- *Have great records.* Records can't be introduced into evidence if they don't exist. It is critical to get records, such as the baseline documentation report and monitoring reports, admitted as evidence. Keep good notes and accurate records as the dispute continues. Document all communications in writing, either by dated internal memos to the file or follow-up letters and emails to landowners, which you scan, print and save. If applicable, take screenshots of texts,

including the date and time, and save in accordance with your records policy. Even contemporaneous handwritten notes documenting the landowner's attitude or specific response when contacted by phone or in person can be persuasive.

- *Do not settle prematurely.* Sometimes settlement of a dispute is preferable, especially if the facts or documents are not entirely favorable to your position and if potential litigation costs are disproportionate to what is at stake. But if you are committed to and prepared for litigation, don't waver. When an organization has a strong case and public values to protect from threat and to uphold, it is a mistake to settle prematurely. On some issues, a land trust can ill afford to agree to a settlement that will diminish its ability to enforce a conservation easement in the future.
- *Remember that what you do affects everyone.* Sometimes a case establishes a precedent benefiting your land trust and land trusts everywhere in similar cases. At the same time, counsel should advise a land trust if the case is not likely to yield a favorable resolution. In those cases, settlement can avoid the "bad cases make bad law" problem and achieve protection of conservation commensurate with the documentation.

When to Call Terrafirma

Terrafirma Risk Retention Group is a member owned and operated liability insurance company specifically for land trusts. It protects its insureds by providing the defense against certain types of violations on conservation lands and easements. Member land trusts have access to a number of risk management resources, including coordinating attorneys who oversee the selection of counsel, management of cases and settlement decisions.

If an initial assessment reveals that the situation is likely to be more than a mere technical deficiency, then file a claim *immediately*. Terrafirma policies require immediate notice when the first hint of a possible problem arises and well before litigation. Generally, the earlier Terrafirma is involved in a conflict, the better off the land trust will be. A land trust may opt to file a "placeholder" claim with Terrafirma. Please see the general guidelines: Potential [Indicators of When to File a Claim](#) and the additional [information on claims](#).

Questions on Terrafirma or Conservation Defense? Please call or write to:

| | | |
|---|---|--|
| Hannah Flake | Leslie Ratley-Beach | Diana Norris |
| Coordinator | Director | Associate Director |
| 202-800-2248 hflake@lta.org | ARMS Vice President and Secretary | 202-816-0221 |
| help@terrafirma.org | 802-262-6051 lrbeach@lta.org | dnorris@lta.org |

DISCLAIMER

The Land Trust Alliance furnishes materials as tools to help land trusts with the understanding that the Land Trust Alliance is not rendering legal, accounting or other professional counsel. If a land trust requires legal advice or other expert assistance, seek the services of competent professionals. The Land Trust Alliance is solely responsible for this content.

Last revised 6-12-20