

Please note, items with a \* next to them are posted in [the Learning Center](#). If you're having problems accessing them, log into the Learning Center first and then click on the link.

## LESSONS LEARNED AND NATIONAL PERSPECTIVE:

### 1. Be prepared to lose at the trial court.

- a. In general, very few people understand conservation easements and the protection of conservation preserves. Judges do what they think is right from their perspective.
- b. Even carefully worded documents can and will be ignored.
- c. It's not what we think an easement says that counts. It is how the courts interpret it.
- d. Our job is to make it clear to the court what that interpretation should be.
- e. Ohio case on a family dispute by the original donors requiring a partition action where land division was prohibited by the CE. See [summary](#). It went all the way to an [appeal](#).
- f. Make a good *CONSERVATION* case for why land should not be divided (in defense of a no-division clause in a conservation easement), that is, why we (people) should care about whether land under easement is divided, e.g.,:
  - Avoid fragmentation of farmland and habitat
  - Keep housing with the land
  - When divided there tend to be multiple ancillary structures, utilities and roads (relates to fragmentation, above)
  - This can also affect scenic values
  - It leads to conflicting land management practices
- g. Do an online database search to see if there have been any sales or subdivisions of properties you hold an interest in.

### 2. Because of #1, we need to do better when drafting conservation easement clauses so they are clear, enforceable, can be monitored easily.

- a. See, [Conservation Easement Drafting: Pointers for Balancing Risk\\*](#), with suggested no-division clause and a suggested cost and fees recovery clause based on what judges have said.
- b. See [June 2020 Wyoming Supreme Court](#) case where too limited clause barred cost and fee recovery even though the land trust and Terrafirma won twice on the substantive dispute of when is a driveway a driveway.
- c. See, the tax case pointers affecting easement drafting linked at the end.

### 3. Most of the time -- **you will not recoup any costs or fees**. If you have board members who think they will recover legal expenses from the opposing party, they should know that recovery rate is less than 10%—a good reason to invest in Terrafirma.

### 4. We might **ask specific questions** when we are monitoring.

- a. Instead of “do you have plans to subdivide” ask, “have you signed any papers . . . “

- b. Be inquisitive, conversational. Listen for clues that something might happen in the future – such as estate planning, a mortgage, a boundary adjustment, a lease, an adult child returning home and so forth.
5. **Take action immediately when you find a trespass.**
  - a. [Action Steps Land Trusts Can Take When Faced with an Encroachment\\*](#)
6. **Not everyone is rational**, and certainly are not all cooperative.
  - a. The most expensive cases are driven by well-funded successor owners of CEs or neighbors to preserves who are determined to have their own way regardless of cost.
7. **Be strong.** Look at all the alternatives and options, be professional, and stand strong. Believe in the intrinsic value of land conservation to everyone.
  - a. Knowing when to shift gears is critical and it is MUCH earlier than most people think.
  - b. Remember good relationships go both ways; they are not one-sided.
  - c. Terrafirma can help you assess the best course of action.
  - d. Chart on costs of long term disputes.
8. **Trespass** occurs on both conservation easements and fee lands.
  - a. Chart on fee land claims.
  - b. Chart of types of CE violations.
9. We are seeing **more violations with ORIGINAL** Landowners!
  - a. No one planned for that, but now we should.
  - b. Chart on costs of disputes with various challengers.
10. **Learn to love [risk management\\*](#)**
  - a. Procedures: how to get hard questions right
    - Think through hard questions before crisis hits, staff turns over, or both.
    - Provide a map for how to handle the unexpected well, without harming a future case or creating new risk.
    - [Enforcement\\*](#)—when and how to “go legal”
    - File management—essential as staff turns over and for admissibility in litigation
    - Document retention—know how to get key documents, and what else you have
  - b. Attorneys on boards
    - Role Confusion – the organization is the client (not the board)
    - A board member is not a disinterested legal advisor even if she is smart and right
    - Conflicts of Interest and Conflicting Duties of Loyalty
    - Attorney board members are ideal to be the liaison with the outside paid attorney

- c. Privilege at Risk
    - [Privilege protects confidential communication between client and client’s lawyer\\*](#)
    - Regardless of representation status, board members ask legal questions of lawyers
    - Risk that communications are discoverable if you use a board member
    - Professional Ethics\_– analysis required at every step of relationship
    - Preparation – in communications regarding role and with staff
    - Procedures – for Conflicts & Privacy; for Staff and Volunteers; to protect Privilege
    - *File a claim early with insurers but keep the communication factual until you have coverage confirmation; then information necessary to coverage or defense is generally privileged*
  - d. On the Terrafirma website there is a [reserve calculator and a risk management course](#) to help customize a plan for your land trust.
  - e. Land Trust Alliance and Terrafirma members also have **free access** to the Nonprofit Risk Management Center from this [page](#). Use this great resource!
  - f. Get a \$1/property discount if your organization takes the risk management webinar every year. Watch for announcements for November – January.
    - Announced in TerraBite – sign up here: <https://terrafirma.org/>.
    - A list will be sent the contacts listed in Terrafirma (you can add your name by going to your land trusts page – there is no limit).
    - We will post a list on the [Conservation Defense page](#) at the Land Trust Alliance site.
  - g. Get the free risk tip of the month from Terrafirma. Sign up for TerraBite on the landing page. They are short and simple
11. Please **file Terrafirma claims** the first instant you see any hint that there might be any potential problem even before you are positive there is actually a problem. If you don’t, you jeopardize the potential for coverage.
- a. The claim year is March 1 to March 1; all claims must be made within the year with 60 day grace period. Call or write to [Leslie](#) (802-262-6051) or [Hannah](#) (202-800-2248) with Terrafirma at first indication of a potential problem.
  - b. Filing a claim does not penalize the land trust in any way ever.
12. **What kinds of insurance** do you need? See [Assessing Insurance Needs\\*](#).
- a. Note, that Directors and Officers insurance includes employment practices and covers claims by volunteers. Make sure the definition of covered persons covers everyone you want it to, e.g., employees who aren’t directors.
  - b. General liability is required to participate in Terrafirma.
  - c. *Land Trust Standards and Practices* [Practice Element 6E1\\*](#) and [6E2\\*](#)
  - d. [A Guide to Risk Management for Land Trusts\\*](#)
13. Terrafirma insures over **9.7 million acres of land** conserved with land trusts
- a. See land trusts, acres, premium, parcels chart
  - b. Terrafirma Risk Retention Group LLC now has 538 land trust members, operates in 48 states plus D.C., and insures over 9.7 million acres with gross written premium paid of over 1.9 million.

- c. [Information](#) on costs, coverage, discounts and claims
- d. See [2019 Annual Report](#)
- e. In 2020 conservation easements comprise the most insured rights with 28,269 (85%) of the enrolled 33,087 parcels from 48 states and D.C. The remainder are land owned (4,547), access easements (58), and trail easements (134) and deed restrictions (79).
- f. Extrapolating the 2015 census data for the current TerraFirma member land trusts shows that their portfolios plus those of self-insured organizations constitutes 83% of all conservation easements and 91% of all easement acres. They also own 50% of fee parcels and 86% of fee acres.
- g. TerraFirma paid over 3 million dollars in costs and fees on behalf of land trusts in almost 1000 claims over seven policy years plus almost four months of the 2020 policy year.
- h. Get your [questions answered](#) on the TerraFirma website FAQ.

**14. Tax stuff you really need to know:**

- i. [Pointers For Balancing Risk When Permitting Structures On Deductible Conservation Easements\\*](#)
- ii. [Pointers for Drafting the Proceeds Clause in Conservation Easements\\*](#)
- iii. [Pointers for Balancing Risk on Conservation Easement Modification Eight Elements to Consider Following the Full Tax Court Decision\\*](#)
- iv. [What you need to know from tax cases shorn of nuances\\*](#)
- v. [Pointers for Balancing IRS Audit Risk When Permitting Commercial Forestry on Tax-Deductible Conservation Easements\\*](#)

**15. More resources.**

- a. [Land Trust Standards and Practices](#), 2017
- b. The Learning Center <https://tlc.lta.org>
  - i. Check out the Elements Descriptions for detailed information on each element of the Standards.
  - ii. Online and on-demand coursework
  - iii. Ask an Expert
  - iv. Forums for a variety of subjects including stewardship and communications
- c. See also, the Land Trust Accreditation Commission's Requirements Manual
  - i. <https://www.landtrustaccreditation.org/>
- d. Land Trust Alliance National Staff:
 

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